# MISSISSIPPI LAW JOURNAL

UNITED STATES *v.* CALIFORNIA
(The Tidelands Case)
*Elton M. Hyder, Jr.*

THE APPLICATION OF THE DETERMINABLE FEE THEORY IN CONSTRUING THE MISSISSIPPI MINERAL LEASE
*Ford W. Hall*

SEARCH AND SEIZURE
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# Contents

LEADING ARTICLES

United States *v.* California (The Tidelands Case) ..... *Elton M. Hyder, Jr.* 265

The Application of the Determinable Fee Theory in Construing the Mississippi Mineral Lease ..... *Ford W. Hall* 291

Search and Seizure ..... *Edgar J. Stephens, Jr.* 313

NOTES

The South's Progress in the Fight Against Freight Rate Discrimination ..... 328

The Fee System in Misdemeanor Cases in the Justice of the Peace Courts in Mississippi ..... 342

RECENT DECISIONS

Administrative Law—Findings of Administrative Body as Res Judicata ..... 351

Bills and Notes—Release of Maker May Not Discharge Indorser ..... 354

Conflict of Laws—Non-resident Motorist Service Act—Validity of Service of Process on Foreign Executors and Administrators ..... 356

Constitutional Law—Equal Protection of the Law—Exclusion of Negroes from Juries ..... 359

Criminal Law—Degree of Punishment Which May Be Inflicted by Person in Loco Parentis ..... 361

Evidence—Reformation of Instruments—Weight and Sufficiency of the Evidence ..... 363

Marriage—Annulment for Non-Age—Legitimacy of Child Born Two Months After Ceremony but Before Decree of Annulment ..... 364

Mines and Minerals—Exception of Mineral Interest ..... 367

Negligence—Automobile Accidents—Assumption of Risk as a Defense ..... 369

BOOK REVIEW

Brief Reviews and Notes ..... 372

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# UNITED STATES V. CALIFORNIA

## (The Tidelands Case)†

*Elton M. Hyder, Jr.**

The case of *United States of America v. State of California,*[1] more popularly known by the misnomer, "The Tidelands Case," did not involve tidelands,[2] but rather lands under tide waters.[3] Specifically, it involved some 3000 square miles of "lands, minerals and other things of value underlying the Pacific Ocean, lying seaward of the ordinary low water mark on the coast of California and outside of the inland waters of the State, extending seaward three nautical miles and bounded on the north and south, respectively by the northern and southern boundaries of the State of California."[4]

To understand the dispute[4a] and to fully grasp the implications of the opinion, we must begin with the legal writings of the Sixteenth Century.

### Early International Law

It was in the year 1598 that Albertico Gentili, an eminent contemporary of Francis Bacon, expressed the concept that "The adjacent part of a sea belongs to one's dominium, and the term 'territory' [terri-

---

†From an address before the Second Annual Law Institute of the Jackson (Miss.) Junior Bar Association, December 6, 1947.

*Assistant Attorney General in charge of the oil and gas division for the State of Texas.

[1]67 S.Ct. 1658 (1947).

[2]"Tideland" is land covered and uncovered by the ordinary tides. Hardy v. California, 109 Ore. 76, 219 P. 197, 199 (1923); Appalachian Land & Develop. Co. v. McRae, 86 Fla. 393, 98 So. 505, 525 (1923).

[3]"Tidewaters" obviously includes the waters of the ocean, all of which are affected by the tides. The Supreme Court of the United States held in *Manchester v. Mass.*, 139 U.S. 240, 258 (1891):". . . the minimum limit of the territorial jurisdiction of a nation over tidewaters is a marine league from its coast . . ."

[4]67 S.Ct. 1658, 1660 (1947). The titles to some 62,000 additional square miles of submerged coastal lands along the coasts of the remaining littoral states are indirectly affected by the decision and the principles announced in the opinion. So far as can be determined, this is the largest land case ever to come before the Supreme Court of the United States.

[4a]Among the numerous articles dealing with the general subject of State ownership of submerged lands under coastal waters are Thomason, *United States v. California: Paramount Rights of the Federal Government in Submerged Coastal Lands,* 26 Texas L. R. 304 (1948); Keeton, *Federal and State Claims to Submerged Lands*

torium] is used both of land and water."[5] A quarter of a century later, Grotius, in expounding the freedom of the seas, conceded that "sovereignty over a part of the sea is acquired . . . in so far as those who sail over the part of the sea along the coast may be constrained from the land no less than if they should be upon the land itself . . ."[6] This allowance of ownership in the marginal sea was stated by Pufendorf in 1660 and 1672[7] as being based on fishing and the defense of the region. Ownership was more than once attributed to the possibility of exclusive appropriation by the littoral state[8] and justified because of the possibility that the resources of the ocean-bed might otherwise be exhausted.[9]

In 1703[10] Cornelius Van Bynkershoek suggested that the extent of effective appropriation in his day was the extent of cannon range. That, he said, "is as far as we seem to have both command and possession. I am speaking, however, *of our own times,* in which we use those engines of war; otherwise I should have to say in general terms that the control of the land ends where the power of men's weapons ends; for it is this, as we have said that guarantees possession."[11]

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*under Coastal Waters,* 52 Texas L. R. 262 (1947); BINGHAM, *The Continental Shelf and The Marginal Belt,* 40 Am. Journal of International Law 173 (1946); BORCHARD, *Resources of the Continental Shelf,* 40 Am. Journal of International Law 53 (1946); IRELAND, *Marginal Seas Around the States,* 2 Louisiana L. R. 2252; LORET, *Louisiana's Twenty-seven Mile Maritime Belt,* 13 Tulane L. R. 523 (1939); WILSON, *Territorial Waters, Claim of State Beyond Three-Mile Limit,* 21 Cornell L. Q. 651 (1936); CLARY, *The Viewpoint of the State,* 4 Interstate Oil Compact Quarterly Bulletin No. 3 and 4, 10 (1945); Note, *Conflicting State and Federal Claims of Title in Submerged Lands of the Continental Shelf,* 56 Yale L.J. 356 (1947).

[5]GENTILI, DE JURI BELLI, B. R. II, 629 (1598) (Trans. of 1612 ed. in CLASSICS OF INTERNATIONAL LAW 384 (1933)).

[6]GROTIUS, DE JURE BELLI AC PACIS, Book II, § XIII (1625) (Kelsey trans. of 1646 ed. in CLASSICS OF INT. LAW 214 (1925)); *id.,* § IX, trans. p. 210.

[7]ELEMENTARIUM JURISPRUDENCE UNIVERSALIS, Book I, p. 31 (1660) (trans. of 1672 ed. in CLASSICS OF INT. LAW 28 (1931)); DE JURE NATURAE ET GENTIUM, Book IV, 383-384, 385 (1672) (trans. of 1688 ed. in CLASSICS OF INT. LAW, 562, 565.)

[8]VATTEL, LAW OF NATIONS, Book I, § 289 (1758) (Fenwick trans. in CLASSICS OF INT. LAW 108-109 (1916); SELDEN, DOMINION OF THE SEA, Book II, 288, 298, 357, 363-370, 373-375, 441-442 (2d ed. 1652) HALE, DE JURE MARIS, 10-11, 31 (Circ. 1676), in HARGRAVES' LAW TRACTS 1787); VON MARTENS, LAW OF NATIONS § 10 (1789) (1st Am. ed. 1795, p. 165).

[9]*Cf.* the *California* case statement that: "There is no substantial support in history for the idea that they [American colonists] *wanted or claimed a right to block off the ocean's bottom for private ownership and use in the extraction of its wealth.*" 67 S.Ct. 1658, 1665 (1947). [Emphasis supplied]

And the further statement that: "The question of who owned the bed of the sea only became of great potential importance at the beginning of this century when oil was discovered there." *Id.* at 1668.

[10]Compare the history up to this date with the statement in the *California* case that "when this nation [the United States] was formed, the idea of a three-mile belt over which a littoral nation could exercise rights of ownership was but a nebulous suggestion." 67 S.Ct. 1658, 1665 (1947).

[11]*DE DOMINIO MARIS* 364 (1703) (trans. of 1744 ed. in CLASSICS OF INT. LAW, 44 (1923)). See also his QUAESTIONUM JURIS PUBLIC 50 (1737): "imperium terrae finiri, ubi finiture armorum potestas."

By the time of the Revolution, the range of guns actually in place on the shore was approximately one marine league,[12] and the distance within which the state could then assert control over its coastal waters formed the original basis for the present minimum three mile dominion of coastal waters.[13] It furnished, indeed, the legal foundation for Lord Stowell's decision in *The Anna,*[14] where, after paraphrasing Bynkershoek's formula, he said that since the introduction of firearms,[15] the boundary of territorial waters "has usually been recognized to be about three miles from the shore."

In the year 1795, contemporary with the American Revolution, Von Martens wrote:[16]

> The sea surrounding the coast, as well as those parts of it which are land-locked, such as the roads, little bays, gulphs, etc., as those which are situated within cannon shot of the shore (that is, within the distance of three leagues), are so entirely the property, and subject to the dominion, of the master of the coast, that he has the exclusive right to all the produce of it, whether ordinary or accidental, as far as relates to things unclaimed by any other lawful proprietor. . . . In short, these parts of the sea surrounding the coast, ought to be looked upon as forming a part of the territory of the sovereign who is master of the shore.

A definite number of marine miles was substituted as an equivalent. It had become, therefore, long before the American Revolution, a rule of law, regardless of the historic appendant reason,[17] that a state is considered

---

[12]The marine league is usually estimated at three marine or nautical miles of 6080 feet each, equivalent to four statute miles (5280 feet each).

[13]Von Meyer, The Extent of Jurisdiction in Territorial Waters (1937) shows the variety of widths adopted by various nations at various times for various purposes. A variation in breadth of claim may have occurred, but this should not affect the *fact* of the claim and ownership.

[14]5 C.Rob. 373, 385, 165 Eng.Rep. 809 (1805).

[15]Surely a century or more before the American Revolution "firearms" were not only "introduced," but in use.

[16]Von Martens, Law of Nations 165-166 (Cobbett trans., Philadelphia 1795). See also Angell, Right of Property in Tide Waters, and in the Soil and Shores Thereof 18-20, 37-38 (Boston 1826); 1 Kent's Commentaries 29 (1826); Hall, Rights of the Crown in the Sea Shores of the Realm 1-7 (1830); Wheaton, Elements of International Law 142-143 (1836).

[17]Thus in the case of Gann v. The Free Fishers of Whitestable, 11 H. or L. cases 192, 218 (1865) Lord Chelmsford stated that the three mile limit depended upon a rule of international law by which every independent state is *considered* to have territorial property and jurisdiction in the seas which was its coast within the assumed distance of a cannon shot from the shore.

to own those lands and resources underlying the coastal waters to a minimum distance of three nautical miles. The definition of the breadth of coastal waters as three miles (a temporary manifestation, not uniformly applied at any time) is merely a limit in space imposed upon the wider claims[18] of earlier times.[19]

In making these assertions of title, the international law writers were fully consistent with the views embodied in the pre-American Revolution common law of England, embracing the broader rule of Crown ownership of the "adjoining seas" and, by reason thereof, ownership of the inland rivers and bays as "arms of the sea."

### The Common Law of England Prior to 1776

All pre-revolutionary English text writers uniformly asserted the King's ownership of the bed of the ocean surrounding the British Isles,[20] sometimes described as the "narrow seas."[21]

The common law rule of ownership by the Crown of lands under navigable waters began with the early claim of the Crown as owner of the "adjoining seas." This claim was extended inward to cover rivers and bays *as arms of the sea.*[22] In 1568 or 1569, Thomas Digges, during the reign of Queen Elizabeth, prepared a treatise entitled "Arguments

---

The range of cannon no longer determined dominion. Cleavage had occurred between the rule and the reason. It had become a matter of internal sovereignty, no longer dependent on the protection of the sovereign.

[18]Until the Seventeenth Century, nations laid claim to great expanses of sea. Hall, International Law § 40 (1880), pp. 189-192 (8th ed. 1924); Fulton, The Sovereignty of the Sea 25-517 (1911). Later the tendency was to limit the breadth of coastal waters by the extent of actual possession effected by physical control through coast artillery. Fulton, *supra,* 537 *et seq.* This limitation later crystallized into a rule of thumb under which independent states were recognized as the owners of submerged lands extending three miles from the coast. Still later, the doctrine became severed from its original factual basis, and the three-mile limit was retained as a convenient measure for certain purposes even after the range of cannon increased.

[19]The narrowing of the claim of breadth of ownership for certain purposes should not operate to divest a state of title to the entire strip (much less to the reduced strip).

[20]Bracton, De Legibus et Consuetudinibus Angliae, lib. 2, c. 2, fol. 9b (1569) (I Swiss ed. 71, 73); Selden, Dominion of the Sea, Book II, pp. 251, 274-75, 365-66, 384-85 (1652); Callis on Sewers 39, 41-42, 44, 53 (2d. ed. 1685); Bacons Abr. (3d ed. 1768) Book I, 623n; Book 4, 153, 156, 157; 2 Blackstone's Comm. 261-2 (3d. ed. 1768).

[21]Hale, De Jure Maris, c. IV, pp. 10-11, c. VI, p. 31 (circ. 1676), in Hargraves' Law Tracts (1787); 1 Roll.Abr. 528 (1668).

[22]The cloud on the titles of individual states to submerged lands underlying *inland* navigable waters within their borders is readily apparent, if those same states are held *not* to be the owners of the submerged *coastal* lands, the very *foundation* of State title to *inland* navigable waters.

Proving the Queens Maties Propertye in the Sea Landes and Salt Shores Thereof"[23] and stated therein:

> And in this estate regall of Englande wee see that the Kings of most auncient times haue in the right of theire crowne helde the seas abowte this Ilande so proper and entire unto them . . .

Digges treated the foreshore[24] and marginal sea exactly alike and, in fact, used the Crown's ownership of the sea as a stepping stone in his argument for the Crown's ownership of the foreshore. Digges first dealt with the sea, saying that as the chief of all waters it should belong to "the cheefe the Kinge himself." He concluded that the King owned the property in the sea and its shore "not only from the lowe watermark downward but also upward to the full sea."[25]

In 1610 in *The Case of the Royal Fishery of the River Banne,*[26] the Privy Council, in determining the ownership of a fishery in a *tidal river,* relied upon the Crown's ownership of the bed of the sea as a basis for holding that the King owned the beds of navigable rivers[27] so far as they partook of the nature of the sea by being subject to the ebb and flow of the tide, saying:

> The reason for which the king hath an interest in such navigable river, so high as the sea flows and ebbs in it, is, because such river participates of the nature of the sea, and is said to be a branch of the sea so far as it flows; 22 Ass. p. 93, 8 Ed. 2, Fitz. Coron. 399, and the sea is not only under the dominion of the king (as is said 6 R. 2, Fitz. Protect. 46. The sea is of the ligeance of the king as of his Crown of England;) but it is also his proper inheritance; and therefore the king shall have the land which is gained out of the sea, Dyer 15 Eliz. 226, b. 22 Ass. p. 93. . . . And that the King hath the same

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[23]Reprinted in MOORE, HISTORY AND LAW OF THE FORESHORE AND SEA SHORE 185-202 (1888); also quoted in FENN, THE ORIGIN OF THE RIGHT OF FISHERY IN TERRITORIAL WATERS 171 (1926).

[24]BOUVIER'S LAW DICTIONARY (3d Rev.) defines "foreshore" as "That part of the land immediately in front of the shore; that part of it which is between high and low water marks, and alternately covered with water and left dry by the flux and reflux of the tide [citing cases]." See also Tenenbaum v. Sea Gate Ass'n., 253 App.Div. 166, 1 N.Y.S.2d 224, 227 (1938).

[25]*Id.* at 185, 187, 191-192.

[26]Dav. 55, 80 Eng.Rep. 540, translated in ANGELL, THE RIGHT OF PROPERTY IN TIDE WATERS 37-38 (1826).

[27]*Cf.* the statement in the *California* case that "as late as 1876 there was still considerable doubt in England about its scope and even its [the marginal zone] existence." 67 S.Ct. 1658, 1666 (1947).

> prerogative and interest in the branches of the sea and navigable rivers, so high as the sea flows and ebbs in them, which he hath in alto mari, is manifest by several authorities and records.

About the year 1667 Lord Chief Justice Hale wrote his famous treatise, *De Jure Maris*[28] stating:

> The narrow sea, adjoining to the coast of England, is part of the wast and demesnes and dominions of the king of England, whether it lie within the body of any county or not.
>
> This is abundantly proved by that learned treatise of Master Selden called Mare Clausum; and therefore I shall say nothing therein, but refer the reader thither.
>
> In this sea the king of England hath a double right, viz., a right of jurisdiction which he ordinarily exerciseth by his admiral, and a right of propriety or ownership. The latter is that which I shall meddle with.

Chief Justice Rolle in his *Abridgment*,[29] first published in 1668, stated that:

> So if a river, so far as there is a flux of the sea, leaves its channel, it belongs to the king; for the English sea and channels belong to the king; and he hath a property in the soil, having never distributed them out to his subjects.

In *Bulstrode v. Hall & Stephens*,[30] decided in 1674, it was stated:

> . . . the bed of all rivers as high as there is flux and reflux of the Sea, is in the King and not in the Lords of the Manors, etc., except by prescription.[31]

So that prior to June, 1947,[32] it might have safely been said that the Crown of England had, since long prior to 1776, been recognized

---

[28]Manuscript, circa 167, reprinted in MOORE, HISTORY AND LAW OF THE FORESHORE AND SEA SHORE 370 *et seq.* (1888).

[29]2 ROLL.ABR. 170.

[30]1 Sid 148, 82 Eng.Rep. 1024.

[31]To the same effect are the following treatises: MEADOWS, OBSERVATIONS CONCERNING THE DOMINION AND SOVEREIGNTY OF THE SEAS (1689); JUSTICE, GENERAL TREATISE OF THE DOMINION OF THE SEAS (1700); 8 MATHEW-BACON, NEW ABRIDGMENT OF THE LAW 18 (Bouvier's ed. 1869); SIR JOHN COMYNS, DIGEST OF THE LAWS OF ENGLAND 166, 167 (1st Amer. ed. from 5th. London ed. 1825); 2 BLACKSTONE'S COMMENTARIES 262 (1765).

[32]The opinion in the *California* case was rendered June 23, 1947.

under the common law as the owner of the bed of the sea for some distance seaward from low-water mark around the coast of England, as well as of the foreshore and the arms of the sea and rivers to the extent that they are subject to the ebb and flow of the tide.[33]

### Early Colonial Charters in America

Early colonial charters[34] patterned the Plymouth Colony charter[35] of 1620, granting:

> . . . all the Main Lands from Sea to Sea together also with all the firme Lands *Soiles* Grounds. Havens Ports Rivers Waters Fishings . . . and all and singular other Commodities Jurisdicions *Royalties*[36] Privileges Franchises and Preheminences both within the said Tract of Land upon the Main and alsoe *within the Islands and Seas Adjoining* . . .[37] [Emphasis supplied]

The *precise breadth* of the seaward boundaries of the colonies was not frequently called into question in the early years of the Republic, but the fact remains that the language in the early colonial charter grants conveyed to the colonies the "adjoining seas." For example, the 1584 Raleigh grant conveyed the "Royalties . . . as well marine as other within the saide lands . . . or the *seas thereunto adjoining.*" The 1611 Virginia charter granted the soils, minerals, etc. "both . . . upon the main, and also within said islands and seas adjoining."[38]

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[33]The English common law authorities, after the year 1776, confirm the Crown's title to the bed of the marginal sea and the arms of the sea. Representative decisions are Secretary of State for India v. Chelinkani Rama Rao, 43 L.R. Ind.App. 192 (1916); Lord Advocate v. Weymiss, [1900] A.C. 48; Blundell v. Catterall, 5 B. & Ald. 268, 106 Eng.Rep. 1190 (1821).

[34]See Virginia Charters of 1609 and 1611-12, 2 Poore, Federal and State Constitutions 1897, 1903 (1878); New Hampshire grant of 1629 and charter in 1635, 2 Poore, *op. cit.* 1271, 1273; Maryland charter of 1635, 1 Poore, *op. cit.* 812; Connecticut charter of 1662, 1 Poore, *op. cit.* 257; Rhode Island charter of 1663, 2 Poore, *op. cit.* 1602; Carolina charters of 1663 and 1665, 2 Poore, *op. cit.* 1383, 1390-1401.

[35]1 Acts and Resolves of Province of Mass. Bay 1.

[36]"Royalties" are defined in Gould, Waters 70-71 (3d ed. 1900) as follows: "The other words employed, and especially the word 'royalties,' in connection with the manifest purpose of the grant, were held to convey to the colonial governments the *right and jurisdiction of the Crown in the shores of navigable waters,* and *in the soil under such waters.*" [Emphasis supplied]

[37]*Cf.* the *California* case: "From all the wealth of material supplied, we cannot say that the thirteen original colonies separately acquired ownership to the three-mile belt or the soil under it, even if they did acquire elements of the sovereignty of the English Crown by their revolution against it." 67 S.Ct. 1658, 1665 (1947).

[38]Immediately following the formation of the original states, each of them commenced and *continued* to enact legislation exercising rights of ownership and jurisdiction in the marginal sea, one example being a 1798 Act of the Rhode Island General Assembly prohibiting any person from keeping more than two lobster pots "upon or within three miles of any of the shores of this state."

So from the very beginning, and by virtue of their charter grants, the colonies could and did claim ownership in the "adjoining seas." The various charters "conveyed to the grantees both the territory described and the powers of government, including the property and the dominion of lands under tide waters."[39] The breadth of their claim may have become *more* definitely established with the passage of time. The *extent* of the *recognition* of the breadth of their claim and ownership, in the "adjoining seas" may have varied, but the *fact* of their claim and ownership remained.

## Early Fishing Statutes

An early statute expressing the claim of colonial ownership to lands and resources therein and thereon within coastal waters is the enactment[40] of the Plymouth General Court in June, 1652, providing that:

> . . . if any man take a drift whale of att the sea and bring or tow it to shore, it [shall] be accounted his owne goods; but if *within a harbour or mile of the shore* they be taken they be reputed the townships where they are brought on shore.

An act of the General Court of Plymouth Colony, in July, 1684, took note of the damage done from catching mackerel with seines "att Cape Codd or else where *near any shore in* this Colonie," and enacted that no person should "catch or draw on shore any mackerell; with nett or netts, sayne or saynes in any parte of this Colonie."[41] Many other colonial fishing regulations[42] testify to the importance which that industry had in early times, and thus to the reality of the colonies' concern with jurisdiction of coastal waters.

These colonial fishing regulations are evidence of the colonial intent to control the sea adjoining and to appropriate, as owner, products of the sea and resources and products of the lands under the sea. Control over fisheries and fishing is part of the "territorial jurisdiction" of a

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[39]Shively v. Bowlby, 152 U.S. 1, 14 (1894). "Tidewaters," of course, include all coastal waters. See Manchester v. Mass., 139 U.S. 240, 258 (1891). Furthermore, lands under the sea must have been included because the Crown owned the "foreshore" or "tideland" by reason of its ownership of the bed of the sea.

[40]Plymouth Colony Laws, Part I, 96-97.

[41]Plymouth Colony Laws, Part II, p. 205 (1836).

[42]Plymouth Colony Laws (1836), Part III, pp. 282; Revised Laws 1671, c. XI, §§ 3, 4, 1 N.H. Laws (1679-1702) 207. Mass. Province Laws 1702, c. 12. 1 Ne vill 86, N.J. Acts 1718, c. XXX. 1 N.Y. Colonial Laws 845; II NY Colonial Laws 1067. *See* Arnold v. Mundy, 1 Halst. (6 N.J.L.) 1, 91-92 (1821).

State[43] and is founded upon ownership of the underlying land.[44] The jurisdiction of a state is coextensive with its territory.[45]

### The States Acquired the Title of the Crown

Under English rule the Thirteen Colonies were free and independent of each other. All attempts at unity had failed.[46] In separating from England they maintained their character as separate and independent states and each acquired the Crown's former title and dominion to all lands within its boundaries,[47] including submerged lands under coastal waters.[48]

The Declaration of Independence recognized that the several states were free and independent and therefore that each had the rights in its territory which originally belonged to the Crown.[49] A year later in 1777 the Articles of Confederation, in fixing the conditions on which the independent colonies joined their efforts for mutual defense, expressly restated the retention by the *individual* states of their "sovereignty, freedom and independence."[50] Their status as such was confirmed by the Treaty of Paris[51] and "all claims to the Government propriety and territorial rights of the same, and every part thereof" was relinquished by

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[43]Manchester v. Mass., 139 U.S. 240, 258 (1891).

[44]McCready v. Virginia, 94 U.S. 391, 394 (1876).

[45]U. S. v. Bevans, 16 U.S. 336 (1818).

[46]*See* generally, and for authorities, Levitan, *The Foreign Relations Power*, 55 Yale L.J. 467, 480 (1946). *See* also 22 Tex. L.R. 286 (1944).

[47]In *Shively v. Bowlby*, 152 U.S. 1, 14 (1894), the Supreme Court stated: ". . . upon the American Revolution, all the rights of the Crown and of Parliament vested in the several States, subject to the rights surrendered to the national government by the Constitution of the United States."

[48]In *Martin v. Waddell*, 16 Pet. 367, 410 (1842), it is stated: "When the Revolution took place, the people of each State became themselves sovereign; and in that character held the absolute right to all their navigable waters and the soil under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government . . . ."

[49]The concluding paragraph of the Declaration states in part: "That these United Colonies are, and of right ought to be, *free and independent States;* that they are absolved from all allegiance to the British Crown, and that all political connexion between them and the State of Great Britain, is, and ought to be totally dissolved; and that *as free and independent States, they have full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which independent States may of right do. And for the support of this declaration* with a firm reliance on the protection of Divine Providence, *we mutually pledge to each other our lives, our fortunes, and our sacred honor.*" [Emphasis added]

[50]The Articles of Confederation provide: "Article 2d. *Each state retains its sovereignty, freedom, and independence;* and every power, jurisdiction and right, which is not by this confederation expressly delegated to the United States in Congress assembled." [Emphasis added]

[51]Definitive Treaty of Paris, signed at Paris on Sept. 3, 1783. 8 U.S.Stat. at L. 80, 81. Art. I provides: *"His Britannic Majesty* acknowledges the said United States, . . . *to be free, sovereign, and independent States; that he treats them as such, and . . . relinquishs all claims to the Government proprietary and territorial rights of the same, and every part thereof*; . . ." [Emphasis added]

the Crown to these individual sovereign states "as such."[52] Paper title could not be clearer. "All claims" of the Crown passed to these "free, sovereign, and independent States . . . as such." These claims necessarily included the claim and title of the Crown to those submerged lands lying seaward a distance of three miles from low-water mark.[53]

In broader language this was established by the Supreme Court in *Shively v. Bowlby*:[54]

> Upon the American Revolution *all the rights of the Crown* and of Parliament vested in the several states subject to the rights surrendered to the national government by the Constitution of the United States. [Emphasis added.]

As sovereign states, each of these colonies owned in proprietary right all lands within their respective boundaries. Even if the extent of such ownership were merely a claim of ownership to lands underlying coastal waters, such claim would be validated and title would relate back to the inception of the claim upon the later recognition[55] of the nations of the world of the extent of that claim. Moreover, by express provision in our Constitution, regarding the territory of the United States, it is provided that *"nothing in this Constitution shall be construed as to prejudice any claims* . . . of any particular states."[56] [Emphasis added.]

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[52]*Ibid.*

[53]The effect of a treaty ceding territory is to vest in the grantee complete and unqualified title to all property possessed by the grantor. Kinkead v. U.S., 150 U.S. 48 (1893); Chicago R.I.&P.R. v. McGlinn, 114 U.S. 542 (1885); Palmer v. Low, 98 U.S. 1 (1878); New Orleans v. U.S., 10 Pet. 662 (1835).

[54]152 U.S. 1 (1893) (citing cases).

[55]Compare the statement of the court in the California case that: "It did happen that shortly after we become a nation our statesmen became interested in establishing national dominion over a definite *marginal zone* to protect our neutrality. Largely as a result of their efforts, the idea of a definite *three mile belt* in which a nation can, if it chooses, exercise broad, if not *complete dominion*, has apparenlty at last been generally accepted throughout the world . . . Not only has acquisition, as it were, of the three mile belt, been accomplished by the national Government, but protection and control of it has been and is a function of national external sovereignty . . . for the reasons we have stated . . . the Federal Government rather than the state has paramount rights in and power over that belt, an incident to which is full dominion over the resources of the soil under that water area, nicluding oil." 67 S.Ct. 1658, 1665 (1947). [Emphasis added]

Note that in the first two sentences of the foregoing quotation, the Federal Government established a "marginal zone" and this became a "three mile belt" and this belt, "complete dominion." This is "complete dominion" built on a foundation of "jurisdiction."

[56]Art. IV, § 3. Certainly there is foundation for "claims" by the states in their charters, statutes, constitutions and long usage by the exercise of jurisdiction and claim over the marginal sea belt. Compare the statement in the *California* case: "We cannot say that the thirteen original colonies separately acquired ownership to the three mile belt or the soil under it." 67 S.Ct. 1658, 1665 (1947).

If the several states of the United States had remained independent, there could be no question as to their boundary in the sea.[57] Save for the powers committed by the Constitution to the Federal Government, the states have retained their status as sovereign and as "independent nations."

The federal government received no land from Great Britain.[58] No provision can be found in the Constitution of the United States wherein the states granted any land to the federal government.[59] The Constitutional delegation of admiralty jurisdiction and commerce regulation cannot be construed as a cession of waters or lands thereunder over which they are to be exercised,[60] although both powers are "paramount."

The federal government has plenary power to conduct our international affairs and it is its duty to maintain an army and navy and to defend the states from invasion. It is also true that the federal government may make international treaties involving the subject of oil as well as many other subjects. But this power does not authorize the federal government to "appropriate" the subject matter of such treaties to its use. The power of defense or the power of international negotiation do not embody the power to "appropriate." Otherwise, the entire interior United States is subject to the "paramount power" of "appropriation." Certainly the Constitution is in force, with the power of the federal government limited by its terms, insofar as concerns land or property within the boundaries of a state.[61] Admittedly the boundary of California is three miles from low-tide, and by reason thereof a boundary of the United States, and the powers of the federal government should be limited by the provisions of our Constitution.

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[57]In *Manchester v. Mass.*, 139 U.S. 240, 257 (1891), it is stated: ". . . if Massachusetts had continued to be an independent nation, her boundaries on the sea, as defined by her statutes, would unquestionably be acknowledged by all foreign nations . . ."

[58]As was said in *Harcout v. Gaillard*, 12 Wheat. 523, 526 (1827): "There was no territory within the United States that was claimed in any other right than that of some one of the confederated states."

[59]In fact, the Constitution recognizes that the Federal Government must depend on cessions from the States to obtain land even for forts and other buildings needful to accomplish Federal purposes. U.S.Cont. Art. I, § 8, cl. 17. *Compare* this provision with the statement in the *California* case: "The ocean, even its three mile-belt, is thus of vital consequence to the nation in its desire to engage in commerce and live in peace with the world; it also becomes of crucial importance should it ever again become impossible to preserve that peace." 67 S.Ct. 1658, 1667 (1947). This may be admitted, but this belt of land should be acquired in the same manner that the Federal Government is constitutionally required to acquire lands necessary for a fort or other structure or means of defense.

[60]U.S. v. Bevans, 3 Wheat. 336, 388 (1818).

[61]Chief Justice Marshall stated in *Johnson v. McIntosh*, 8 Wheat. 543, 573 (1823): ". . . title to lands, especially is, and must be, admitted, to depend entirely *on the law of the nation in which they lie.*" [Emphasis added]

## The Doctrine of State Ownership of All Lands Under Navigable Waters within Their Boundaries

It has long been recognized by repeated pronouncements of the Supreme Court of the United States that the several states have title to the beds of all navigable waters within their boundaries,[62] which, of course, includes lands underlying coastal waters within the boundaries of a State. In *Port of Seattle v. Oregon and Washington RR Co.*,[63] Mr. Justice Brandeis states:[64]

> The right of the United States in the navigable waters within the several States is limited to the control thereof for purposes of navigation. Subject to that right Washington became, upon its organization as a State, *the owner of the navigable waters within its boundaries and of the land under the same.* [Emphasis supplied]

The reason for this well founded doctrine is set forth in *Pollard v. Hagen*:[65]

> To give to the United States the right to transfer to a citizen the title to the shores and the soils under the navigable waters, would be placing in their hands a weapon which might be wielded greatly to the injury of State sovereignty, and deprive the States of the power to exercise a numerous and important class of police powers.[66]

So "there is no belt of land under the sea adjacent to the coast which is the property of the United States and not the property of the States."[67]

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[62]McCready v. Virginia, 94 U.S. 391, 394 (1876); Mumford v. Wardwell, 6 Wall. 423, 436 (1867); Smith v. Maryland, 18 How. 71, 74 (1855); Den v. The Jersey Co., 15 How. 426 (1853); and many others too numerous to cite.

[63]255 U.S. 56, 63 (1921).

[64]This is a representative quotation. Note that "boundaries" is the determinative factor of the outermost ownership of the "navigable waters" and "land under the same." Concededly the waters of the Pacific over the lands in dispute in the *California* case, were "navigable waters" and concededly the "boundaries" of California extended three miles into the Pacific from low tide.

[65]3 How. 212, 230 (1845).

[66]This reasoning is, of course, applicable to the beds of all "navigable waters" both inland and coastal. State economy is just as much concerned with the regulation and development of the soils which underlie the adjoining coastal waters whether for fishing, oyster culture, or mineral development, as with the soils under the navigable waters.

[67]Commonwealth v. Manchester, 152 Mass. 230, 241 (1890).

*Particular Decisions*

In *The Abby Dodge,* 223 U.S. 166 (1912), the Supreme Court held that the Federal government cannot regulate sponge fishing in the Gulf of Mexico within the territorial waters of a State[67a] and that an indictment for violation of a federal law prohibiting the use of diving apparatus in sponge fishing must negative the possibility that the offense occurred in State waters. It based this ruling (p. 174) on the principle that "each State owns the beds of all tide-waters within its jurisdiction" and quoted its formulation of that principle from *McCready v. Virginia,* 94 U. S. 391 (1876).

The Government attempted to distinguish the *Abby Dodge* case on the ground that no contention was made that the United States owned the sponges within the three-mile belt (Br., p. 161).[67b] The argument for the United States in that case, however, unsuccessfully advanced (223 U. S. at 170-71) the same contention respecting the international nature of the three-mile belt upon which the Government relied in the *California* case. Since sponges grow attached to the bed of the ocean far beyond low-water mark, it is inconceivable that the Court would have held the Federal statute inapplicable to the taking of sponges, if the bed of the ocean belonged to the United States.

That the States retained their ownership within the three-mile limit is established also by the Supreme Court's decision in *Manchester v. Massachusetts,* 139 U. S. 240 (1891). A Massachusetts statute of December 28, 1859, had proclaimed that "The territorial limits of the Commonwealth extend one marine league from its seashore at low-water mark." Manchester was convicted in the State Court of illegal fishing within the State's territorial waters, but declared that the locus was on the high seas and therefore within the exclusive jurisdiction of the Federal Courts. The Supreme Court upheld the State Court. The Supreme Court said that:

> . . . *if Massachusetts had continued to be an independent nation, her boundaries on the sea, as defined by her statutes, would unquestionably be acknowledged by all foreign nations,* and her right to control the fisheries within those boundaries would be conceded. The limits of the right of a nation to control the fisheries on its seacoasts, and in the bays and arms of the sea within its territory, *have never been placed at less than a marine*

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[67a] The argument before the Court showed that the territorial waters of Florida, there in question, extended three leagues from shore, in the Gulf of Mexico (223 U. S. at 169).

[67b] The Government contended there, in order to show that the sponges were taken outside territorial limits of the State, that the sponge beds in question were "from fifteen to sixty and sixty-five miles out" (223 U. S. at 177).

> *league from the coast on the open sea*; . . . (139 U. S. at 257). [Emphasis added.]
>
> *The extent of the territorial jurisdiction of Massachusetts over the sea adjacent to its coast is that of an independent nation*; and, except so far as any right of control over this territory has been granted to the United States, this control remains with the State . . . *Within what are generally recognized as the territorial limits of States by the law of nations, a State can define its boundaries on the sea* . . . (.139 U. S. at p. 264). [Emphasis added].

The Government suggested in the *California* case that because the offense occurred in Buzzard's Bay, the *Manchester* opinion had no bearing on rights within the three-mile belt (Br., pp. 156-157). The important point dealt with by the Court in that case was not that the offense occurred in a bay, but that the illegal fishing for which Manchester was convicted occurred within the three-mile limit. The State's ownership of the bay was based upon its ownership of the lands within three miles of its shore. The Court said (139 U. S. at 258):

> We think it must be regarded as established that, as between nations, the minimum limit of the territorial jurisdiction of a nation over tidewaters is a marine league from its coast; that bays wholly within its territory not exceeding two marine leagues in width at the mouth are within this limit . . .

In other words, the holding of State title within a bay of "two marine leagues in width at the mouth" is merely a means of applying the general principle of State ownership of submerged lands within a marine league of the coast. Its application to Buzzard's Bay therefore constitutes acceptance of the general principle, and does not represent any special rule designed only for bays and harbors.

These cases were distinguished by the majority opinion in the *California* case on a basis that (in these cases) "no question whatever was raised or decided as to title or paramount rights in the open sea."[67c]

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[67c] Cases announcing or affirming the principle of law announced in *The Abbey Dodge* and *Manchester* cases include: Borax Consolidated v. Los Angeles, 296 U.S. 10, 12, 15 (1935); Massachusetts v. New York, 271 U.S. 65, 89 (1926); Port of Seattle v. Oregon and Washington R., 255 U.S. 56, 63 (1921); Louisiana v. Mississippi, 202 U.S. 1, 52 (1906); Shively v. Bowlby, 152 U.S. 1, 11 (1894); Illinois Central R. v. Illinois, 146 U.S. 387, 435 (1892); McCready v. Virginia, 94 U.S. 391, 394 (1876); Weber v. Board of State Harbor Commissioners, 18 Wall. 57, 65 (U.S. 1873); Mumford v. Wardwell, 6 Wall. 423 (U.S. 1867); Smith v. State of Maryland, 18 How. 71, 74 (U.S. 1855); Den v. The Jersey Co., 15 How. 426 (U.S. 1853); Martin v. Waddell, 16 Pet. 367, 410 (U.S. 1842); U.S. v. Bevans, 3 Wheat. 336, 386 (U.S. 1818).

*Right of a State to Define Her Boundary on the Sea*

One of the rights of the States was the right to fix their boundaries on the sea. This was so stated in *Manchester v. Massachusetts*:

> Within what are generally recognized as the territorial limits of States[69] by the law of nations, a State can define its boundaries in the sea.

Moreover, the right of a State upon its admission into the Union, to rely upon its established boundary line, cannot be impaired by subsequent action on the part of the United States.[70]

No distinction has been or can be drawn between the original thirteen States and those later admitted, with respect to the ownership of submerged lands underlying navigable waters within their boundaries.[71] California, like other states entered the Union "upon equal footing with the original States, in all respects whatever,[72] particularly with absolute property in and dominion over the beds underlying her navigable waters.[73] No one can suppose that it was the thought of Congress to change the whole policy of the government and reserve to the United States the title and control of the soil beneath the navigable waters.[74] "The title of the United States to lands underlying navigable waters within the State passes to it, as incident to the transfer to the State of local sovereignty" upon the creation of the state from those lands owned by the United States.[75]

In the face of repeated and uniform recognition by the Supreme Court of the United States of State title to submerged lands underlying coastal waters, there is no justification for applying any different rule or rationale. For as stated in *United States v. Guaranty Trust Co.*:[76]

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[69]A "marine league." Manchester v. Massachusetts, *supra* note 68, at 257.

[70]New Mexico v. Colorado, 267 U.S. 33, 43 (1924). The *California* decision, for all purposes, effectively changes the boundary of the State of California from three miles seaward from low tide to a constricted boundary of low-tide.

[71]Mass. v. New York, 271 U.S. 65, 89 (1926).

[72]Brewer Oil Co. v. U.S., 260 U.S. 77 (1922); Scott v. Lattig, 227 U.S. 229, 242 (1913); Weber v. State Harbor Comm'n, 18 Wall. 57 (1873); Pollard v. Hagan, 3 How. 212 (1845).

[73]Mass. v. New York, 271 U.S. 65, 89 (1926).

[74]*Cf.* Mann v. Tacoma Land Co., 153 U.S. 273, 284 (1894).

[75]U.S. v. Oregon, 295 U.S. 1, 14 (1935). In the case of California, the United States acquired territory by cession from Mexico. Entering the Union "upon equal footing with the original States," California was entitled to define her boundaries in the sea, and did so. By her Constitution, adopted in 1849, California defined her boundaries as running "to the Pacific Ocean and extending therein three English miles; thence running in a northwesterly direction and following the direction of the Pacific coast." Art. XII, § 1. This Constitution was approved and ratified by the President and reported by him to the Congress, which referred to it in the Act of Admission adopted Sept. 9, 1850. 9 Stat. 452.

[76]33 F.2d 533, 537 (1929), *aff'd* 280 U.S. 478 (1930).

> Reannouncement [of a] doctrine repeatedly over a period of more than 100 years serves to establish it, not only as the consistent view of the court, but also as a rule of property upon which practical transactions have been, and are being, based.

Even if all the statements and decisions referred to were dicta, they would still be the best evidence of the American law.

### Immediate Background of the California Case

Up to 1937 all departments of the Federal Government, including Interior and Justice, consistently recognized and approved State titles to submerged lands under coastal waters and rejected all claims of individuals contrary thereto.

In 1937 the Interior Department for the first time in history took the attitude that Federal oil leases might be granted in tide and submerged lands. Some 200 applications were pending in 1945 for California off-shore oil lands. On several occasions the Secretary of the Interior stated publicly that he would grant some of these applications. On March 6, 1945, he said the granting of such applications would have to be a general policy.

In 1937 a resolution was introduced in the United States Senate, by Senator Nye, asserting the claim that the United States was the owner of the submerged lands under coastal waters. Subsequently, Senator Nye introduced another resolution, asserting a similar claim for the United States. Neither of these bills passed. In 1938 similar measures were introduced by Senator Nye and others. Committee hearings were held, but none of the bills passed.

On May 29, 1945, Francis Biddle, as Attorney General of the United States, caused a suit to be filed in the Federal District Court at Los Angeles, California, against Pacific Western Oil Corporation, claiming on behalf of the Federal Government some 144 acres of land below low-water mark, off the coast of California, near Santa Barbara. The land in question was leased by Pacific Western Oil Corporation from the State of California under the State Leasing Act; however, the petitions of plaintiff did not name the State of California as a party defendant.

In 1945 several bills were introduced in the Congress to quiet the titles of the respective States to lands beneath navigable waters, including both inland and coastal. Extensive hearings were held by the Judi-

ciary Committees and H. J. R. 225 emerged after passing the Congress. It was promptly vetoed by the President on the ground that a suit was pending in the United States Supreme Court.

In the interim following the last named bill to quiet the titles of the States, the Attorney General of the United States had dismissed the suit in California and filed an original complaint in the Supreme Court of the United States, naming as defendant, the State of California, and alleging that the United States "is the owner in fee simple of, or possessed of paramount rights in and powers over, the lands, minerals and other things of value underlying the Pacific Ocean, lying seaward of the ordinary low-water mark on the coast of California and outside of the inland waters of the State extending seaward three nautical miles and bounded on the north and south respectively, by the northern and southern boundaries of the State of California." The prayer was for a decree declaring the rights of the United States in the area as against California and all persons claiming under it from continuing to trespass upon the area in violation of the rights of the United States.

### The Decision in the California Case

On June 23, 1947, Justice Black delivered the opinion in the *California* case.[77]

Contrary to prevailing lay opinion the Supreme Court did *not* hold the Federal Government to be the owner of the lands in dispute. It did hold that "California is not the owner of the three-mile marginal belt along its coast,"[78] and, that "the Federal Government has the paramount right and power to determine in the first instance when, how, and by what agencies, foreign or domestic, the oil and other resources of the soil of the marginal sea, known or hereafter discovered, may be exploited."[79] And as pointed out by Mr. Justice Frankfurter in his poignant dissent:[80]

> The Court . . . grants the prayer but does not do so by finding that the United States has proprietary interests in the area.[81]

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[77]67 S.Ct. 1658 (1947).

[78]"Now that the question is here, we decide for the reasons we have stated that California is not the owner of the three-mile marginal belt along its coast, and that the Federal Government rather than the State has paramount rights in and power over that belt, an incident to which is full dominion over the resources of the soil under that water area, including oil." 67 S.Ct. 1658, 1668 (1947).

[79]67 S.Ct. 1658, 1664 (1947).

[80]*Id.* at 1669.

[81]This is the correct and proper construction because the word "proprietorship" was struck by the Court from the Government's proposed decree.

The theory of the majority opinion in support of its decision is, in naked essence, eminent domain, without mention of compensation.

The Supreme Court upheld the "paramount right and power" of the United States on those rights asserted by the federal government as follows:

> The United States here asserts rights in two capacities transcending those of a mere property owner. In one capacity it asserts the right and responsibility to exercise whatever power and dominion are necessary to protect this country against dangers to the security and tranquility of its people incident to the fact that the United States is located immediately adjacent to the ocean. The Government also appears in its capacity as a member of the family of nations. In that capacity it is responsible for conducting United States relations with other nations. It asserts that proper exercise of these constitutional responsibilities requires that it have power, unencumbered by state commitments, always to determine what agreements will be made concerning the control and use of the marginal sea and the land under it.[82]

The bases of this "paramount power" paraphrases the holding of the Supreme Court in *Pollard v. Hagen*[83] that:

> The right which belongs to the society, or to the sovereign, of disposing, in case of necessity, and for the public safety, of all the wealth contained in the State, is called the eminent domain. . . .;

and the statement in *Kohl v. U. S.*[84] that the right in a state of eminent domain is distinct from and paramount to the right of ultimate ownership.[85]

It should be here mentioned that the running theme of the majority opinion follows the theory and even the phraseology of the testimony of Representative Sam Hobbs of Alabama, in the Hearings before the Judiciary Committee of the 76th Congress, with regard to submerged oil

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[82]67 S.Ct. 1658, 1663 (1947).
[83]44 U.S. 212, 222 (1845).
[84]91 U.S. 367 (1875).
[85]This right of eminent domain is "needed for forts, armories and arsenals, for navy yards and lighthouses" and for "other public purposes."

lands, on March 22 and 23, 1939. Mr. Hobbs appeared in support of the Federal Government's claim for ownership of the three-mile California belt.[85a]

The majority opinion may, in and of itself, confer upon the federal government rights equivalent to ultimate ownership in lands and resources, not alone within the "marginal sea," but within the interior United States. The federal government defends the interior United States and represents the interior United States as well as the marginal belt in "external relations" with foreign governments.

Is not the tidelands belt as essential for national security as the *adjoining* three-mile marginal sea? Could not that land between high tide and low tide be subjected to the "paramount powers" of the federal government on the same reasoning? Is not the shore line encircling the United States even more essential for national security than the three-mile belt?

Are not the Great Lakes of even greater importance to "national security?" It is worthy of mention, by way of illustration, that the former Chief of Staff of the United States Army, General Dwight D. Eisenhower, issued a statement on June 25, 1947, calling for United States-Canadian arms standardization and stating that:

> . . . in another war the first attack probably would be aimed at the Great Lakes and St. Lawrence River industrial areas.[86]

Yet contrary to the logical end of the reasoning in the *California* case, the Supreme Court of the United States in *Illinois Central RR Co. v. Illinois*[87] upheld state ownership of the Great Lakes and reasoned as follows:

> We hold, therefore, that the same doctrine as to the dominion and sovereignty over and ownership of lands under the navigable waters of the Great Lakes applies, which obtains at the common law as to the dominion and sovereignty over and ownership of lands under *tide waters on the borders of the sea,*

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[85a]See Hearings before Committee on the Judiciary, in H.J. 176 and H.J. Res. 181, with regard to submerged oil lands, March 22 and 23, 1939, pp. 5, 6, 9-17, 33, 35-38, 40, 44, 46-48. See the testimony of Mr. McNamee, appearing on pp. 272, 275-280, *ibid.*

[86]United Press Release, Washington, D. C., June 25, 1947, Los Angeles Daily News, June 25, 1947.

[87]146 U.S. 387, 453 (1892).

> *and that the lands are held by the same right in the one case as in the other, and subject to the same trusts and limitations. . . .* [Emphasis added.]

Those Great Lakes separate even more closely the United States and a foreign nation (Canada). Illinois cannot defend Lake Michigan. The federal government will. Illinois cannot deal in external affairs with the Government of Canada. The President will, as the "sole organ of the nation in its external affairs, and its sole representative with foreign nations."[88]

To go even further, the *lands* of the United States border the nations of Canada and Mexico. Would the duty of the federal government to defend those lands and to conduct international relations with those nations bestow a power to continue the use of resources beneath the lands bordering those nations? If so, how far inland into the interior? This would seem to be unthinkable; yet the bases of the *California* decision support a "paramount power" within the federal government over those lands. In the words of Mr. Justice Frankfurter in his dissent:

> The fact that these oil deposits in the open sea may be vital to the national security, and important elements in the conduct of our foreign affairs, is no more relevant than is the existence of uranium deposits, wherever they may be, in determining questions of trespass to the land of which they form a part.

These bases, in fact, confer upon the federal government the ultimate ownership of all lands within the interior United States. For under the decision, no compensation need be paid. The government need only assert. No mention was made in the opinion of Congressional appropriation of "just compensation" to any claimants who might have invested heavily, relying in "good faith" on state ownership.

### The Application of the Constitution

It was undisputed in the case that the belt of land in dispute was *within* the exterior Pacific boundary of California. Being within this boundary, it would follow that it was within the boundary of the United States and in such case the Constitution of the United States would apply. If, as the Supreme Court held,[89] the marginal zone has only *recently* been established by the dominant federal sovereign under international law, proprietorship and dominion should inure to California, because it

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[88]U.S. v. Curtiss-Wright Corp., 299 U.S. 304, 319 (1936).
[89]*See* 67 S.Ct. 1658, 1666 (1947).

has long been claimed by California, as evidenced in its western boundary provision in its Constitution. Moreover, rules of international law may *only* be applied to the "open sea"[90] and that part of the ocean outside of and *beyond* the boundaries of the State and Nation.

Finally, and as so succinctly stated by Chief Justice Marshall in *Johnson v. McIntosh*:[91]

> . . . title to lands, especially is, and must be, admitted, to depend entirely *on the law of the nation in which they lie*.[92] [Emphasis added]

### The Cloud on the Title of Inland States to the Beds of Underlying Inland Navigable Waters

The *California* decision casts a cloud on the title of inland states to the beds underlying their inland navigable waters. For the majority opinion stated:[93]

> As previously stated this Court has followed and reasserted the basic doctrine of the Pollard case many times. And in so doing it has used language strong enough to indicate that *the Court then believed* that States not only owned tidelands and soil under navigable inland waters, but also owned soils under all navigable waters within their territorial jurisdiction, whether inland or not . . . [Emphasis supplied]

The *Pollard* case has been cited with approval in 52 Supreme Court decisions and 244 federal and state court decisions. It has been consistently followed for 100 years without dissent. The attempt of the majority to limit the rationale of this line of cases to inland waters is contrary to the decisions themselves. The history of the rule, as re-

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[90]In *Louisiana v. Miss.*, 202 U.S. 1, 52, the Court stated: "The Maritime belt is that part of the sea which, in contradistinction to the open sea, is under the sway of the riparian States, which can exclusively reserve the fishery . . . for their own citizens, whether fish, or pearls, or amber, or other products of the sea."

[91]8 Wheat. 543, 572 (1823).

[92]Space does not permit consideration of further statements in the opinion which are believed erroneous. Mention should be made of the statement that "acquisition, as it were of the three-mile belt, had been accomplished by the National Government" only recently. 16 S.Ct. 1658, 1666 (1947). The definition of the width of coastal waters as three miles (a temporary limitation, not uniformly applied at any time) is merely a limit in space imposed upon the wider claims of earlier times. The adoption of this limit cannot operate to transfer to the federal government the ownership of the soil which had been first in the King and then in the colonies and then in the states.

[93]67 S.Ct. 1658, 1667 (1947).

vealed by the cases, clearly negatives any intention that the rationale applied only to inland waters. In fact, the entire rule in the common law began with the sovereign's ownership of the adjoining sea and was extended to inland waters as "arms of the sea," thus forming one rule of ownership applicable to all navigable waters, without any distinction as to whether inland or seaward. The history of the rule, its origin from the sea and extension to inland waters, as arms of the sea, perhaps accounts for the absence of any previous challenge of state ownership in that area (the three-mile belt) which gave birth to the rule itself. The rule as interpreted by the Supreme Court is the *converse* of the rule believed to be established by the common law of England and the international law of the nations.

Furthermore, this statement[94] is made in the opinion:

> The Government does not deny that under the Pollard rule, as explained in later cases, California has a *qualified ownership of lands under inland navigable waters such as rivers, harbors, and tidelands down to the low-water mark. It does question* the validity of the rationale in the Pollard case that ownership of such water areas, any more than ownership of uplands, is a necessary incident of the State sovereignty contemplated by the "equal footing clause."[94a] [Emphasis supplied]

What did the court mean? Webster says that when used in this sense, "qualified" means "limited or modified in some way, especially as to legal effect." If it should be held subsequently that state ownership of inland navigable waters is limited to uses on which the federal government has no "paramount" claim and applies its recent decision that the federal government has a "paramount right" as against the state to take "oil and other resources of the soil," regardless of the "bare legal

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[94] *Id.* at 1664.

[94a] Consider the statement made in the Address of Dean Terrill before the 1947 Annual Meeting of the Rocky Mountain Oil & Gas Association, Denver, Colorado, November 21, 1947:

"From the inception of the litigation, those handling it on behalf of the United States Government have evidenced a certain duplicity, in that they have purported not to question the ownership by the states of lands underlying bays, harbors, rivers or other inland waters and, by reason of such assertions, have attempted to persuade the states other than the coastal states not to aid the coastal states in their resistance to this federal 'grab.' At the same time, in their briefs, and in their arguments before the Supreme Court, those representing the United States of America have attacked the whole line of cases which confirm title in the states of lands underlying bays, rivers, harbors and other inland waters and asserted that this whole line of cases is unsound."

title" of a "mere property owner," then inland owners are not much safer than littoral state ownership of the lands under the marginal belt.

The best the court could say for this inland submerged property was that "state dominion over lands under its land-locked navigable waters finds *some argument for its support.*"[94b]

These statements not only lend information as to the policy and theory of the Federal Government but the statements and the decision strike the very foundation of State ownership of the beds of inland navigable waters. Moreover, this is but a part of the now-bleeding rule of State ownership of lands underlying navigable waters *within their boundaries,* inland or not. What becomes of this rule, and what has become of the foundation of the rule of State ownership of inland navigable waters? One need only observe that the doctrine of res judicata is *now* of little import.

## The Solution

The National Association of Attorneys General has long been active in the defense of the *California* case and in the confirmation of State title through Congressional action. This Association is now preparing to sponsor legislation in Congress recognizing and confirming State title to lands under navigable waters, inland or not, "subject only to the paramount rights of the Federal Government in a national emergency, in commerce and in national defense, the exercise of which shall never of itself vest any proprietary interest in such lands in the Federal Government; but recognizing the right of the Federal Government to take any of such property necessary for national defense by priority purchase or due process of law."[95] On reliable authority the Association has high hopes of the passage of such legislation by a two-thirds vote and a Presidential approval. The Presidential veto of over a year ago of H.J.R. 225, quitclaiming any right of the federal government to these lands, was based on the pendency of the *California* case in the Supreme Court. Now that the *California* case has been decided and if the Congressional intent is to recognize and confirm state title to these lands, a dictate from the will of the people, surely the President will adopt that will and approve that legislation.

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[94b]In the Government's Brief in the *California* case, the rule with respect to tidelands and "inland waters" is attacked as being "upon a false premise," "erroneous," and "unsound." At other places, the rule is called "wrong," "patently unsound," "fallacy," and "a legal fiction." *See* Government's Brief, pp. 11, 72, 143, 144, 148, 150, and 153.

[95]Resolution of State Ownership of Submerged Lands, adopted by National Association of Attorneys General at Boston, Massachusetts, October 28, 1947.

The State of Mississippi owns some 800,000 acres of submerged lands—potential oil lands. Already the state has received over $100,000 in bonuses for state leases. Hundreds of thousands of dollars more may be paid for the oil-rich Gulf Coast lands. Texas and Louisiana have each received millions of dollars for state leases on the coastal lands.

Mississippi was only recently, and before the *California* decision, unable to lease a portion of the submerged land because of the federal claim. It was leased after the passage of H. J. R. 225. Additional state leases on Mississippi's Gulf Coast lands might be taken if title were cleared. It is the peculiar characteristic of oil companies not to spend hundreds of thousands of dollars to develop lands if there is any defect of title.

The members of the Bar of Mississippi must arouse the people, secure their interest, demand the views of the state's congressmen and senators and actively support the proposed legislation. Neither the interest of the people of one state nor even several States can pass this legislation. It was difficult before with the federal government dormant—they will be active now and it will be a fight. The Bar, of all other organizations in Mississippi, should be the first to go on record by resolution as approving and actively sponsoring the proposed legislation.

To further appreciate the urgency of this matter to the people of Misissippi, one need only consider a recent letter, dated January 16, 1945, from Secretary of Interior Harold Ickes, to former Governor Bailey:[96]

> My dear Governor Bailey: My attention has been called to an advertisement of the State Mineral Lease Commission of Mississippi appearing on page 303 of the Oil and Gas Journal for December 30, 1944. This advertisement gives notice that the commission will meet on January 15 to receive proposals for the leasing for oil and gas purposes the following lands:
>
> "The water bottoms in the Mississippi Sound, all bays, tributaries, estuaries thereto, also the marshland owned by the State of Mississippi adjacent to the bays and sounds and the islands and submerged lands which are owned by the State of Mississippi in the Mississippi Sound and/or the Gulf of Mexico, estimated to contain more than 800,000 acres."

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[96]Reprinted in Hearings Before the Committee on the Judiciary, United States Senate, 79th Congress, 2d Session, on S.J. Res. 48 and H.J.Res. 225, Feb. 5, 6, and 7, 1946, p. 229.

> I would appreciate having a more detailed description of the lands involved, particularly information as to whether they are tidal lands, that is, those between high and low tide; how far from low tide the other lands extend; and which lands are in the Gulf of Mexico and in the other waters described in the notice.
>
> I should also like to know the basis for the State's claim of ownership of these lands and the oil and gas contained therein.

This is a states' rights fight—not a charitable request. Stripped of legal paraphernalia the decision of the *California* case sharply focuses the conflict in authority, powers, rights and duties between the dual sovereignties that are the American government.[97] The fear of our statesmen a century ago that the state governments would be "the rival power of the federal government" has now inverted to the fear of the power and supremacy of the dominant federal government. The decision in the *California* case is but a step removed from the nationalization of our oil industry. Presumptively, other natural resources, necessary for the defense of this country, are likewise only one step removed from federal control. Mississippi produces not only oil and gas, but coal and gypsum (the rock of 900 uses). Are these minerals *above* the assertion of the "paramount right" of the Federal Government over the right of "the mere property owner"?[98] These are not wild assertions. They are studied deductions.

Transplanting the former control of the individual states over an area comprising some 65,000 square miles at least, and as large as five New England states combined, would seem to be a drastic step toward further federalization and overcentralization of our government.[99]

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[97]Compare this with the theme of the address of Hon. Millard E. Caldwell, Governor of Florida, delivered before the 28th Annual Meeting of the Texas Mid-Continent Oil & Gas Association at San Antonio, Texas, Oct. 16, 1947.

[98]67 S.Ct. 1658, 1663 (1947).

[99]No mention was made of the title of Mississippi to her submerged coastal lands. It was concisely stated by her Attorney General, Greek L. Rice, in the hearings printed in the House document referred to in footnote 96, and appears therein on p. 228. The portion dealing with title is as follows:

"The State of Mississippi claims ownership of the water bottoms in the Mississippi Sound. This comprises an area of approximately 800,000 acres, including the bays, tributaries, estuaries thereto, the marsh lands adjacent to the bays and sounds, islands and submerged lands. The State has been continuously in the undisputed ownership of this property for more than a hundred years. The Federal Government, nor any other agency, ever questioned or disputed that ownership in any way, or at any time during that long period of years.

"The property claimed by the State is completely within the boundary lines of the State as prescribed by Congress and fixed by the State Constitution. Under chapter 23, United States Statutes at Large, volume 3, page 348, adopted March

1, 1817, is found the enabling act which empowered our people to form a constitution and State government, and authorized our admission into the Union as a State, on an equal footing with the original states. In section 2 of this act the southern boundary line of the new State is definitely fixed. This southern line is fixed in the enabling act as commencing on the east at a point on the Gulf of Mexico, 'thence westwardly, including all the islands within six leagues of the shore, to the most eastern junction of Pearl River with Lake Borgne.'

"The only restraint placed upon the State in regard to property of this nature within the confines of the State is found in section 4 of this act, which says 'and that the River Mississippi and the navigable rivers and waters leading into the same, or into the Gulf of Mexico, shall be common highways, and forever free, as well to the inhabitants of the State, as to other citizens of the United States, without any tax, duty import, or toll therefor, imposed by the State'. In accordance with this act, Mississippi was formally admitted into the Union by resolution of Congress on December 10, 1817, United States Statutes at Large, No. 3, page 472.

"It will be observed that the constitution, adopted pursuant to this act, defines the southern boundary of Mississippi the same as fixed by Congress in this act. I refer you to section 3, Constitution of Mississippi 1890, and previous constitutions of this State."

# THE APPLICATION OF THE DETERMINABLE FEE THEORY IN CONSTRUING THE MISSISSIPPI MINERAL LEASE

*Ford W. Hall**

The discovery of oil in Mississippi in 1939 and the many varied activities which have accompanied and followed this event, have caused Mississippi attorneys to be faced with legal problems of more or less unfamiliar subject matter.[1] But the Mississippi lawyer's problems which have accompanied this new industry to our State happily are different from those which confronted the practitioner after the Drake discovery well in 1859 in Pennsylvania and in the other pioneer oil producing states. The task of the pioneer oil and gas lawyer was that of taking problems created by the production of petroleum and making analogies to phases of law already existing, and his job was further complicated by the lack of authentic geological information available to him. On the other hand, the Mississippi lawyer now can refer to innumerable oil and gas cases decided in other states, and also more accurate scientific data is available. But the situation is unfortunately not so simple as it might seem. First, a vast majority of local lawyers do not have ready access to the reports of other states,[2] and second, those who do have available reported cases from other states find that they are confronted with conflicts in basic theories applied in the various jurisdictions, and the cases are in obvious disaccord on many issues created by oil and gas activities. Especially is the disagreement apparent in cases involving the oil and gas lease.[3] Few attorneys experienced in oil and gas law will quarrel with the proposition that more versatility is required of the oil and gas practitioner than is called for in any other field of law. The lawyer who has legal problems involving oil and gas before him must not only learn something about the scientific and technical problems which are involved in the oil and gas industry, but he must

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[1]Prior to 1939 there were only six cases decided by the Mississippi Supreme Court dealing directly with oil and gas questions; since 1939 at least thirty-six decisions involving oil and gas problems have been handed down by the Court.

[2]The Mississippi Law Journal has recognized the need for more Mississippi materials on the subject. In 1941 a complete issue was devoted to oil and gas problems. 13 Mississippi Law Journal 281-466 (1941). Also, Volume 18 of the Journal carried a good many articles dealing with oil and gas subject matter. With the same purpose in mind, the Jackson Junior Bar Association held two Law Institutes (December, 1946, and December, 1947) at which various papers on oil and gas law were presented to Mississippi lawyers.

[3]For a discussion and citation of cases on the various divergent views as to the nature of the property interests created by an oil and gas lease, see 1 Summers, The Law of Oil and Gas § 152, pp. 371-376 (Perm. ed. 1938).

also know and be able to apply basic principles of contracts, torts, equity, property law, constitutional law, administrative law and agency when advising his client. The lawyer's job is further complicated by the fact that oil and gas are similar in their nature to no other mineral. Inasmuch as leasing activity is not confined strictly to producing areas, any lawyer in the State in any locality is likely to meet in his practice questions which will require some basic knowledge of the legal import of the oil and gas lease. It is with the hope that this article may be of some practical help to Mississippi lawyers that it is written.

## Nature of Property Interest

First of all, it should be clearly kept in mind that an oil and gas lease is not a demise within the meaning of the term as it is used in real property law. In most instances the application of rules governing ordinary leases to the oil and gas lease is likely to lead to incongruous results.[4] Therefore, it is necessary to call on other sources when dealing with oil and gas leases.

It is also necessary to keep in mind the fact that Mississippi has adopted the ownership in place theory;[5] this means that a deed which purports to sever the minerals from the surface estate creates two separate and distinct fee simple estates in the tract of land, just as effectively as if the land had been divided into two separate parcels.[6] A minority of oil producing states follow the "exclusive rights" doctrine or the non-ownership theory when dealing with fugacious minerals.[7] In those states the holder of mineral rights is not considered as having title to the minerals, therefore he cannot pass a fee estate in the oil and gas by executing any kind of instrument inasmuch as he himself has no fee to pass on to a grantee. However, in Mississippi and other ownership in place jurisdictions the owner of the mineral estate is deemed to have a fee simple title to the minerals, and therefore he logically can convey to a third party a fee simple or a lesser estate in the oil and gas.

The owner of a fee title to realty can convey the fee, he can create an estate of lesser dignity in favor of another, or he can transfer incor-

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[4]See Walker, *The Nature of the Property Interests Created by an Oil and Gas Lease in Texas,* 7 Tex. L. Rev. 539, 544 (1929).

[5]Cook v. Farley, 195 Miss. 638, 15 So. 2d 352 (1943); Stern v. Great Southern Land Co., 148 Miss. 649, 114 So. 739 (1927); Moss v. Jourdan, 129 Miss. 598, 92 So. 689 (1922). *See* Wade, *Recent Mississippi Oil and Gas Cases,* 18 Miss. L.J. 243, 244 (1947); Note, 13 Miss. L.J. 427, 431 (1941).

[6]*See* Humphreys-Mexia Co. v. Gammon, 113 Tex. 247, 254 S.W. 296, 302, 29 A. L. R. 607, 615 (1923).

[7]*See* Moses, *The Constitutional Legislative and Judicial Growth of Oil and Gas Conservation Statutes,* 13 Miss. L.J. 353, 358 (1941).

poreal rights in the land to other persons. Thus the first problem to be determined is what property interest does the fee simple owner of oil and gas transfer to the lessee when an oil and gas lease is executed.

It is impossible in an article of this kind to discuss every type of oil and gas lease which has been used from time to time in the oil business; for this reason the comment herein will be confined to the type of lease in general use in Mississippi at the present time. This lease is called a "Producers 88 Form Lease," (also an "unless" lease) and although there are some differences in phraseology found in "Producers Forms" used by the various operators, in basic structural composition the leases are similar.

The first clause is the granting part of the lease which gives to the lessee the right to explore, drill for and produce minerals on the tract of land which is the subject of the lease. The land is described following this paragraph.[8]

A second paragraph in the lease is called the "habendum" clause; it provides that the lease shall exist for a short term of years (usually 5, but not over 10 years) "and as long thereafter as oil, gas or other mineral is produced from said land hereunder." The quoted phrase is called the "thereafter" clause and makes it possible for the lease to exist indefinitely so long as minerals are being produced on the premises.

Next, there is the "royalty clause" which provides usually that the lessor shall receive one-eighth of all oil or gas produced and saved from the land. This one-eighth interest which the lessor has is not subject to a pro rata allotment of drilling expenses, but is based on one-eighth of the total produced, without any subtraction for any costs incurred in exploring, drilling, or producing.

A fourth paragraph is usually referred to as the "drilling and delay rental" (also "unless") clause of the lease, and it usually provides that if operations for drilling are not commenced on or before one year from the date of the lease, the lease shall terminate, *unless* on or before such anniversary date the lessee shall pay or tender a sum of money called a delay rental. From this clause comes the commonly expressed term, "unless" lease. The paragraph goes on to allow the privilege of deferring, on like payment or tender of delay rentals, drilling operations in like manner for successive one-year periods during the primary term of the lease.

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[8]The same problems as to land descriptions are involved in oil and gas leases as are met with in ordinary conveyances. On this subject see EWING, *Mississippi Land Descriptions,* 18 MISS. L.J. 381 (1947).

Other paragraphs provide for assigning of various interests, warranty of title to the land, and miscellaneous clauses which have been added to take care of situations usually occasioned in the past by court decisions adverse to the lessee's contentions.

The Mississippi Supreme Court has indicated that the execution of an ordinary oil and gas lease transfers to the lessee a determinable fee estate in the minerals.[9] In other words, the mineral *lease* is actually a *conveyance,* passing a determinable fee estate to the lessee. While there is a dearth of authority in Mississippi on the subject of determinable fees,[10] the question has received an extensive discussion in other common law jurisdictions. Although there is some authority to the effect that the statute *Quia Emptores*[11] made the existence of determinable fees no longer possible,[12] the vast majority of jurisdictions have recognized the existence of such an estate.[13]

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[9]Koenig v. Calcote, 25 So.2d 763, 765 (Miss. 1946); Lloyd's Estate v. Mullen Tractor and Equipment Co., 192 Miss. 62, 83, 4 So.2d 282, 288 (1941). *See* Stokely v. State *ex rel* Knox, Atty. Gen., 149 Miss. 435, 446, 115 So. 563, 566 (1928); Wade, *loc. cit. supra* note 5, at p. 246; Note, 14 Miss. L.J. 427, 436 (1941). *See* also Calcot v. Texas Pac. Coal & Oil Co., 157 F.2d 216, 220 (C.C.A. 5th 1946).

Apparently Texas and Mississippi are the only states which now follow the determinable fee theory. See Walker, *loc. cit. supra* note 4, at p. 4. Compare the California holding that an oil and gas lease can create a determinable fee in a profit a prendre, or the *right* to enter and remove the oil and gas. Scheel v. Harr, 80 P.2d 1035 (Cal. App. 1938); Dabney v. Edwards, 5 Cal.2d 1, 53 P.2d 962 (1936).

Professor Summers criticises the determinable fee theory in 1 Summers, *op. cit. supra* note 3, § 153, p. 381, where he argues that interests created by an oil and gas lease cannot be properly classified under traditional common law property concepts. While Professor Summers is correct in his conclusion that an attempt at a definition of the interest created by a mineral lease must not overlook any of the vital clauses found in that lease, it is believed that the theory that an ordinary mineral lease operates as a conveyance of a determinable fee can be logically applied and accomplish beneficial results. See Walker, *loc. cit. supra* note 4, 6 Tex. L. Rev. 125 (1928); 7 Tex. L. Rev. 1, 539 (1928-29); 8 Tex. L. Rev. 483 (1930); 10 Tex. L. Rev. 291 (1932); 11 Tex. L. Rev. 399 (1933). Professor Walker's articles on oil and gas should be required reading for anyone claiming to be a student of the subject.

[10]The case of Moss Point Lumber Co. v. Harrison County, 89 Miss. 448, 42 So. 290 (1906), is cited in 21 C. J. p. 923 as involving a determinable fee, but an examination of this case shows that the problem is that of a lease for a long term of years of sixteenth section school lands.

[11]18 Edw. I, c. 1, 3 (1290).

[12]See Gray, The Rule Against Perpetuities §§ 31-41, pp. 26-46 (4th ed. 1942) and authorities there cited; 1 Tiffany, The Law of Real Property § 220, p. 383 (3rd ed. 1939).

[13]See Powell, *Determinable Fees,* 23 Col. L. Rev. 207 (1923) *passim;* Walker, *loc. cit. supra* note 4, p. 548-553.

Peyton, C. J., dissenting in Kilpatrick v. Graves, 51 Miss. 432, 443 (1875), assumes the validity of a determinable fee in Mississippi and uses the terms "base," "qualified." and "determinable" fees interchangeably. For a technical distinction between these terms, see Walker. *loc. cit. supra,* note 4, p. 541. In the case of Itawamba County v. Sheffield, 195 Miss. 359, 13 So.2d 649 (1943), the court apparently takes it for granted that a determinable fee can exist in Mississippi.

At common law two essential requisites must exist before a determinable fee is created: 1. The creation of a fee estate of inheritance capable of existing forever.[14] 2. A provision in the conveyance that the estate shall be automatically terminated on the happening of a stated event generally called a "special limitation."[15]

The ordinary oil and gas lease is said to satisfy the first of these requirements inasmuch as provision is made for the lease to exist so long as oil or gas is produced, and production possibly could continue forever.[16] But the second requirement calls for more detailed examination.

Generally the holder of a determinable fee estate has all the rights that a fee simple owner has,[17] but these rights are subject to being cut short by the happening of one or more of the aforementioned events called special limitations. A special limitation is defined as "that part of the language of a conveyance which causes the created interest automatically to expire upon the occurrence of a stated event . . ."[18] The grantor in such a conveyance thus retains only a possibility of reverter. It should be noted that the occurrence of the special limitation causes the estate *ipso facto* to terminate, and the holder of the possibility of reverter need take no affirmative action since he is entitled to possession forthwith.[19] This distinguishes the determinable fee estate from another kind of defeasible fee called an estate on condition subsequent. In the latter type of estate, the grantor retains a "right of entry for condition broken" which of course requires some affirmative action on the part of the grantor (or his successor) to terminate the estate, and the estate continues until the right of entry is asserted.[20] Thus, construction problems arise in interpreting an oil and gas lease to determine whether the different clauses create special limitations or conditions or perhaps another type of legal concept called a covenant.[21] As gathered from the whole instrument, an ascertainment of the true intent of the parties is the

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[14] 1 TIFFANY, *op. cit. supra* note 12, § 220, p. 386.

[15] A. L. I., RESTATEMENT OF PROPERTY § 44 (1936).

[16] See Stephens County v. Mid-Kansas Oil and Gas Co., 113 Tex. 160, 173, 254 S.W. 290, 295 (1923).

[17] To the effect that this statement is subject to some qualification, see POWELL, *loc. cit. supra* note 13, at p. 232.

[18] A. L. I., RESTATEMENT OF PROPERTY § 23 (1936).

[19] *Id.* § 44, comment *a*, illustration 1.

[20] *Id.* §§ 24, 45.

[21] Certain clauses of the oil and gas lease create express covenants, *i.e.*, covenants of warranty, agreements to drill offset wells, and promises to bury pipe lines below ordinary plow depth. The oil and gas lease also gives rise to various implied covenants, which are discussed in PRESSLER, *Implied Covenants in Oil and Gas Leases*, 18 MISS. L.J. 402 (1947).

cardinal rule to be applied in interpreting written contracts.[22] Certain words such as "on condition", "provided", "so that", are generally said to create conditions,[23] whereas words like "so long as", "until", and "while", are usually characteristic of special limitations.[24]

Since it is possible in the same written instrument to have clauses creating conditions subsequent and covenants as well as clauses of special limitation, it becomes necessary to examine the oil and gas lease to determine which of these legal concepts the vital clauses create.

### The Habendum Clause

The habendum clause usually states that the lease shall be in effect for a stated number of years, and as long thereafter as oil, gas or other mineral is being produced from the land. The stated term is called the "primary" term, and by the express provision in this clause, if oil is not being produced at the end of this primary term, then the lease should terminate by its own terms, *i.e., ipso facto*. It seems clear that this clause is intended to operate as a special limitation, and unless oil is being produced at the expiration of the primary term, the lease expires automatically and the lessor need take no affirmative action to terminate it.[25]

Actually there are two special limitations in the habendum clause: (1) failure to be producing oil or gas at the end of the primary term, and (2) cessation of production at anytime thereafter. Since both of these limitations turn on the term "produced", they properly may be considered together. The first limitation requires that oil or gas must be in production at the end of the primary term for the lease to continue in existence. The second limitation applies to the "thereafter" period and requires that oil or gas must be produced continually after the expiration of the primary term, in order to keep the lease in force. Since these two events are special limitations, they should be strictly enforced, inasmuch as they are not forfeiture provisions within the technical meaning of the term "forfeiture."[26] In this connection equitable policy against strict enforcement of forfeitures is not involved, and there is no reason for applying in a case construing the habendum clause of an oil and gas lease, the familiar principles that equity abhors a forfeiture and will

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[22]*See* 1 Tiffany, *op. cit. supra* note 12, § 190, p. 306; Sun Oil Co. v. Burns, 84 S.W.2d 442, 444 (Tex. Comm. App. 1935).

[23]1 Tiffany, *op. cit. supra* note 12, § 190, p. 305.

[24]1 Tiffany, *op. cit. supra* note 12, § 218, p. 381.

[25]It was so held in Stephenson v. Calliham, 289 S.W. 158 (Tex.Civ.App., 1926).

[26]Stephenson v. Calliham, *supra* note 25. For an application in Mississippi of the general rule that equity abhors a forfeiture *see* New Orleans Great Northern R. v. Belhaven Heights Co., 122 Miss. 190, 84 So. 178, 13 A.L.R. 560 (1920).

not lend its aid to enforce a forfeiture.[27] The courts have almost uniformly been rather strict in literally enforcing the terms of the habendum clause. In jurisdictions which do not follow the determinable fee theory in construing oil and gas leases, the same result is generally reached by considering the attainment of production in some quantity by the end of the primary term to be a condition precedent to the enlargement of the lease into the "thereafter" period.[28] An example of the strict construction of the habendum clause is found in the holding that unfavorable climatic conditions and governmental regulations which prohibit the drilling of a well, will not excuse the lessee for failure to produce oil or gas during the exploratory term,[29] unless the lease contains a saving clause to excuse the failure to produce because of such contingencies.[30]

As noted previously, the interpretation of the two special limitations in the habendum clause hinges on the meaning of the word "produced." However, the fact that a special limitation is enforced strictly according to its terms, does not mean that a stilted or artificially technical meaning should be given to the stated limitational event. Thus, where the cause of a temporary cessation of production was unforeseen and unavoidable, and where the lessee in good faith used reasonable diligence to resume production, and actually did resume production within a reasonable time, it was properly held that the lease did not terminate by reason of cessation of production.[31]

Some leases contain the phrase "produced in paying quantities" in the habendum clause, but the Producers 88 form currently used in Mississippi omits the words "in paying quantities." Nevertheless, courts of other jurisdictions in construing similar leases have generally taken the view that even in the absence of this phrase, production must be in paying quantities in order to extend the lease into the secondary or indefinite period,[32] and the production must continue in paying quantities after the primary term to keep the lease in effect.[33]

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[27]Stephenson v. Calliham, *supra* note 25.

[28]*See* 2 SUMMERS, *op. cit. supra* note 3, § 293, p. 126-128, and authorities cited in footnote 42, p. 128.

[29]Baldwin v. Blue Stem Oil Co., 106 Kan. 848, 189 Pac. 920 (1920).

[30]Such a saving clause found in one lease currently in use in Mississippi is as follows: "Whenever any cause beyond Lessee's control (such as fire, flood, windstorm or other act of God; law order or regulation of any governmental agency; or inability to secure men, material or transportation as a result of the present war) prevents, interrupts or interferes with any of Lessee's operations hereunder this lease shall not be terminated, nor shall Lessee be held liable."

[31]Scarborough v. New Domain Oil & Gas Co., 276 S.W. 331 (Tex. Civ. App., 1925).

[32]2 SUMMERS, *op. cit. supra* note 3, § 298, pp. 133-134.

[33]Garcia v. King, 139 Tex. 578, 164 S.W.2d 509 (1942).

Generally it is considered that "paying quantities" as applied in the habendum clause, means that a well must produce enough to pay a small profit over the cost of operating the well, but initial costs of bringing the well to production are excluded from consideration. Under this rule a well may never repay the drilling costs, and the operation as a whole may result in a loss; nevertheless, so long as returns exceed costs of *producing* the oil or gas, the lease will be kept alive so far as the limitational events in the habendum clause are concerned.[34]

It has been held that "produced in paying quantities" contemplates normal conditions, and where because of a depression the operations were being carried on at a loss, the court allowed the lease to continue in force inasmuch as it was apparent that the lease could be operated at a profit "under normal conditions."[35] While this holding may be defended as carrying out the probable intent of the parties, it does give rise to an element of uncertainty since the parties are likely to differ in their ideas as to what are "normal" situations, and this often necessitates a judicial decision to decide the dispute. A recent case[36] emphasizes the rule that when production in paying quantities ceases during the secondary term, the lease automatically terminates. That case held that no waiver or estoppel arises when the lessor permits the lessee to remain in possession and continues to accept royalty payments, inasmuch as the lease automatically terminates because of the failure to maintain production in paying quantities.

In order to mitigate the harshness of the automatic termination of a lease because of failure to produce, most operators have inserted several provisions in the Producers 88 Form which should be considered in connection with the habendum clause.

One such clause in general use today provides for the lease to remain in force in the absence of production, even beyond the end of the primary term, if drilling operations are continued into the "thereafter" period without a lapse of more than a stated length of time (usually 60 days or 3 months) between the cessation of work on a dry hole and

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[34]Denker v. Mid-Continent Petroleum Co., 56 F.2d 725, 84 A.L.R. 756 (C.C.A. 10th 1932). See Notes, 48 A.L.R. 887 (1927), 84 A.L.R. 761 (1933), 91 A.L.R. 900 (1934), for rather exhaustive discussions of the meaning of the term "paying quantities" in an oil and gas lease. The term "paying quantities" has another meaning in connection with the question of the lessee's covenant to drill offset wells to protect the leased premises. The difference in meaning between the situation involving the covenant and the habendum clause should be kept in mind to avoid possible confusion. See 2 SUMMERS, *op. cit. supra* note 3, § 306, pp. 176-177.

[35]Denker v. Mid-Continent Petroleum Co., 56 F.2d 725, 84 A.L.R. 756 (C.C.A. 10th 1932).

[36]Gas Ridge v. Suburban Agriculture Properties, 150 F.2d 363 (C.C.A. 5th 1945).

the commencement of drilling of another well. Thus, if more than the agreed length of time should elapse between drilling operations after the primary term had expired, then the lease would terminate *ipso facto,* by special limitation, because of failure to comply with one of the terms of the lease having to do with the length of time the lease is to remain in force.

Another clause is similar to the one just discussed, but provides for resumption of drilling operations at the lessee's option within a stated time after production ceases. For example, suppose a lessee discovers oil in paying quantities during the primary term and operates the well for several years after the primary term of the lease expires. The well then ceases to be a paying producer; the lessee would then have a certain number of days as stated in the lease to commence drilling another well, and the lease would remain in force so long as drilling operations continued without a lapse of more than the stated length of time, or if production were obtained by the second well, so long as oil continued to be produced from the premises in paying quantities. It thus will be seen that the two clauses discussed immediately above make it possible to extend the life of a lease beyond the primary term without continuous production, yet both clauses apparently countenance automatic termination of the lease for failure to comply with either or both.

Because of the inherent difficulties of immediate marketing of gas in a newly discovered field,[37] it is customary to include in the lease a clause to the effect that on discovery of gas the lessee may pay to the lessor an annual stipulated amount (usually a sum equal to the delay rental) and so long as such payments are made, the well will be considered a producing well within the meaning of the word as used in the habendum clause. However, this provision does not relieve the lessee of the implied covenant to use reasonable diligence in marketing the production,[38] but the clause came into use to alleviate the harshness of the rule of earlier cases[39] which held that the lease expired for failure to produce gas when there was no market for it, and in spite of the fact that utmost diligence would not have resulted in marketing of the gas within the primary term. By providing for these lieu payments the lessee is able to keep the lease in force until a market outlet for the gas production can be obtained.

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[37]See 2 SUMMERS, *op. cit. supra* note 3, § 29, pp. 139-140.

[38]See PRESSLER, *loc. cit. supra* note 21.

[39]*See, e. g.,* Stanolind Oil & Gas. Co. v. Barnhill, 107 S.W.2d 746 (Tex. Civ. App. 1937).

Care should be exercised in order definitely to ascertain the due date of these lieu payments.[40]

A good many of the Producers 88 forms currently used in Mississippi provide for not counting against the lessee, in computing the habendum clause, the time during which operations are prevented because of a law, order or regulation of a governmental agency. This clause also does not change the nature of the habendum clause as a special limitation, but does make it possible for a lease to be kept alive without production for a longer period of time than the stated primary term. Many leases also provide for excusing non-production or non-development for a length of time that delay in operations is caused by "fire, flood, windstorm or other act of God." It seems that this provision would also not affect the holding that the habendum clause gives rise to a special limitation, but it does introduce an element of uncertainty into the picture, inasmuch as it would frequently be necessary for a jury to determine the factual issues of whether there was such an act of God that prohibited operations, and also just how long that event actually interrupted or should have interrupted the lessee's development.

With the clause just discussed should be compared the provision found in some leases excusing the lessee from compliance with all express or implied *covenants* when he is prevented by a federal or state law, rule or regulation. It is doubtful if this clause will accomplish everything the lessee probably intended for it to do. There is a well settled distinction between a covenant and a special limitation,[41] and in the ordinary situation the former term does not embrace the latter. Thus, since the habendum clause is a clause of special limitation, the provision relating to excusing the lessee for failure to perform a covenant would have no effect on the habendum clause.

Still another clause sometimes found in modern leases recites:

> After the discovery of any mineral in paying quantities, lessee shall be exempt from loss or forfeiture of this lease in whole or in part, except after final judicial ascertainment that lessee has failed to perform its duty hereunder, and thereafter lessee shall have a reasonable opportunity to perform and prevent such loss or forfeiture, . . .

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[40]For a discussion of some of the problems which may arise under this clause of the lease, see WALKER, *Developments in the Law of Oil and Gas in Texas During the War Years—A Résumé*, 25 TEX. L. REV. 1 (1946).

[41]The distinction is drawn rather forcefully in W. T. Waggoner Estate v. Sigler Oil Co., 118 Tex. 509, 19 S.W.2d 27 (1929). For a further discussion see WALKER, *loc. cit. supra* note 4. 8 TEXAS L. REV. 483-491 (1930).

A similar provision has been held to be against public policy and void by a Texas court[42] on the grounds that it would require two trials before final judicial ascertainment of a controversy, it would be too great an interference with the course of justice and would oust the court's jurisdiction in violation of the rules of the jurisdiction where the suit is pending. In addition since the language of this clause is couched in terms of "forfeiture" and "duty," it would have no effect on the habendum clause which is a clause of special limitation.[43] Thus for two reasons it is doubtful if the clause in question can have any effect on the habendum clause.

It is quite generally held that where failure to obtain production within the primary term is due to wrongful interference on the part of the lessor, the lease will be extended beyond the original date for the same length of time that the lessee was kept from conducting mineral oprations by the wrongful act of the lessor.[44] While estoppel is probably adequate to cover the usual case involving this situation,[45] it would be possible to say that the nature of an oil and gas lease requires the connotation that both the lessor and lessee promise to practice the utmost good faith, and that there is an implied agreement that where the failure to obtain production is the fault of the lessor, the lessee shall have that much additional time to carry out the terms of the lease. However, the courts should proceed with caution when reading into the lease terms which aren't there. It seems this problem can best be solved by inserting an express stipulation in the lease to cover this specific problem. This has been done in a few leases currently used in Mississippi.[46]

### The Drilling and Delay Rental Clauses

The usual provision concerning drilling and delay rentals in the Producers 88 form lease stipulates that if drilling of a well is not commenced within a year from the date of the lease, the lease shall terminate unless within that time payment or tender of a certain amount called a

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[42]Frick-Reid Supply Co. v. Meers, 52 S.W.2d 115 Tex.Civ.App. 1932). See 6 Williston, A Treatise on the Law of Contracts, § 1722, p. 4863 (Rev. ed. 1938).

[43]*Supra* note 41.

[44]2 Summers, *op. cit. supra* note 3, § 301, pp. 159-160.

[45]2 Summers, *op. cit. supra* note 3, 1947 Pocket Part, p. 35.

[46]The clause reads as follows: "Should the right, title or interest of Lessee hereunder be disputed by lessor, or any other person, or should the base title of Lessor to the land or minerals or any part thereof be disputed by any person, the time covered by the pendency of any such dispute shall not be counted against Lessee either as affecting the term of the lease or for any other purpose, and Lessee may suspend all payments without interest until there is a final adjudication or other determination of such dispute."

delay rental is made by the lessee to the lessor.[47] This is also called the "unless" clause. The lease further provides for deferment for successive twelve-month periods during the primary term on payment of delay rentals in like manner and like amounts. This paragraph has been carefully drafted in the light of past court decisions. It should be noted that no duty is imposed on the lessee to drill during the primary term, and if he fails to drill he incurs no liability in the absence of a necessity to drill a protection or off-set well to prevent the premises from being drained by a producing well on adjoining land. Under the terms of this clause, it is solely at the lessee's option as to whether the life of the lease is extended at the end of the first year and at the end of each successive year during the exploratory term.

Careful examination of this paragraph of the lease leads to the result that it also is a clause of special limitation in that it provides for automatic termination of the lease unless a well is drilled or delay rental payments are seasonably made. Hence, the equitable rule against forfeiture should have no application to a case involving the delay rental clause, and this is the reasoning applied by the Texas courts[48] although there are some earlier Texas cases[49] employing the term "forfeiture" in construing the delay rental clause. Thus, even where the rental payment is only a day or so late, or where it is delayed in the mails through no fault on the part of the lessee, nevertheless, the Texas view is that the lease terminates because there is a failure to comply strictly and literally with the delay rental clause in regard to the amount and time of payment.[50]

It is necessary to consider certain other qualifying clauses in the lease which have been inserted to take care of the strict holding of the courts in regard to compliance with the provisions for payment of rentals. Probably the most important of these clauses is that which authorizes the payment of rentals to be made by the check or draft of Lessee mailed

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[47]The Mississippi Supreme Court has on two occasions decided what day is the due date of annual delay rentals in unless leases. In *Hughes v. Franklin,* 29 So.2d 79 (Miss. 1947), the court held that while a lease was not effective until delivery, the contract could be made to run from a date prior to delivery, and the due date of delay rentals was computed from the prior date rather than from the date of delivery. In *Love Petroleum Co. v. Atlantic Oil Producing Co.,* 169 Miss. 269, 152 So. 829 (1934), it was held that where the day of annual payment was left blank in the lease, the lessee had until the last day of the month to pay the rental.

[48]McDaniel v. Hager-Stevenson Oil Co., 75 Mont. 356, 243 Pac. 582 (1926); Woods v. Post, 26 S.W.2d 299 (Tex. Civ. App. 1930); Humble Oil & Refining Co. v. Davis 296 S.W. 285 (Tex. Comm. App. 1927). *See* also Empire Gas & Fuel Co. v. Saunders, 22 F.2d 733 (C.C.A. 5th 1927).

[49]See WALKER, *loc. cit. supra* note 4, 8 TEXAS L. REV. 483, 528 (1930), and cases cited in footnote 156 of that article.

[50]Appling v. Morrison, 227 S.W. 708 (Tex. Civ. App. 1921).

or delivered on or before the due date of payment. This clause makes the mailing or delivering of the check or draft the requirement to keep the lease in force and obviates the difficulty of deciding the effect of an unforeseen delay in the mails. There is some doubt as to whether the lessor would be required to accept payment by check in the absence of such a clause authorizing a check or draft as the medium of payment.[51]

Oil and gas leases universally make provision for delay rentals to be paid to a depository bank, which bank is constituted by the lease the agent of the lessor; thus, seasonable payment made to the depository bank would fulfill the requirements of the special limitation and the lease would remain in effect irrespective of any error made by the bank in crediting the lessor's account.[52]

The closing of so many banks during the early part of the thirties is largely responsible for the clause in the Producers 88 form which provides that the lessee shall not be in default until thirty days after lessor delivers a recordable instrument to the lessee denominating a new depository bank in the event the bank named in the lease becomes defunct or fails to accept the delay rental for any other reason. Stipulation is also made in the lease for payment of rentals directly to lessor.

It was generally held in construing the delay rental clause of earlier leases, that once drilling operations were commenced during the primary term and the effort did not result in a producing well, the lessee could not keep the lease alive by resumption of delay rentals. This of course led to the insertion of the stipulation to the effect that during the primary term the lessee may resume payment of delay rentals after the lessee's efforts have resulted in a dry hole. This clause also contemplates keeping the lease in effect by later drilling if commenced within a stipulated time. Again, these provisions do not change the nature of the delay rental clause, but merely provide for additional events affecting the length of time during which the lease can remain in effect. It is apparent that automatic termination is contemplated where, after a dry hole is drilled, the lessee neither drills another well nor resumes delay rental payments.

Some leases in use in Mississippi today contain the following clause:

> In the event Lessor considers that Lessee has not complied with all its obligations hereunder, both express and implied, Lessor shall notify Lessee in writing, setting out specifically in what re-

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[51] 2 SUMMERS, *op. cit. supra* note 3, § 345, pp. 248 *et seq.*
[52] *See* 2 SUMMERS, *op. cit. supra* note 3, § 343, pp. 238-239.

> spects Lessee has breached this contract. Lessee shall then have sixty (60) days after receipt of said notice within which to meet or commence to meet all or any part of the breaches alleged by Lessor. The service of said notice shall be precedent to the bringing of any action by Lessor on said lease for any cause, and no such action shall be brought until the lapse of sixty (60) days after service of such notice on Lessee. . .

A moment's thought will lead to the conclusion that this clause can have no effect on either the habendum or delay rental clauses[53] inasmuch as neither the failure to be producing at the end of the primary term, nor failure to continue production during the secondary period, nor failure either to drill or to pay delay rentals involves the breach of an obligation, but all such events are special limitations marking the termination of the lease by its own terms and requiring no sort of affirmative action whatsoever on the part of the lessor.

Another clause sometimes found reads as follows:

> In case of suit, adverse claim, dispute or question as to the ownership of the rentals or royalties (or some part thereof) payable under this lease, Lessee shall not be held in default in payment of such rentals or royalties (or the part thereof in doubt) until such suit, claim, dispute or question has been finally disposed of, and Lessee shall have thirty (30) days after being furnished with the original instrument, or instruments disposing of such suit, claim, or dispute (or a certified copy or copies thereof), or after being furnished with proof sufficient, in Lessee's opinion, to settle such question, within which to make payment. . .

While it is probable that the courts will give effect to this clause, it is likely that nothing less than an actual bona fide, honest disagreement resting on a substantial basis or founded on some reasonably tenable or plausible grounds[54] will suffice to call this provision into play. In cases where there is doubt as to the existence of such a dispute, the case should be decided against the lessee inasmuch as he prepared the lease, and the familiar rule of construction would be invoked which declares that in cases of doubtful context, an oil and gas lease is con-

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[53] *See* WALKER, *loc. cit. supra* note 4, 8 TEXAS L. REV. 483, 516, 522 (1930).

[54] For definitions of the term "dispute" see 12 WORDS AND PHRASES 703-705 (Perm. ed. 1940).

strued most strongly against the party who prepared it.[55] Again, this clause would not change the nature of the delay rental clause, but could operate to enlarge the length of time within which production must be obtained, or rentals or royalties paid. However, the provision does introduce an element of uncertainty inasmuch as it would not be known if the lease was still in force until a jury determined whether there was an actual bona fide dispute as to the ownership of the various mineral rights.

Probably the most difficult problem in connection with the application of the determinable fee theory arises when the lessee fails to pay or tender delay rentals on time, but the parties thereafter assume that the lease still is in force. Logically, the passing of the date when delay rentals are due would result in the automatic termination of the lease inasmuch as this event is a special limitation, and no sort of action short of executing a new lease should be allowed to restore the lessee's rights;[56] otherwise it seems the statute of frauds[57] and statutes relating to conveyances[58] would be violated. As has been noted previously, a special limitation operates of its own force on the happening of the stated event, and since it is not a forfeiture it in no wise depends on any volition on the part of either the lessee or lessor once that event has occurred. However, the Texas courts have not followed this reasoning to its logical conclusion, and have held that late acceptance of rentals operates as a waiver[59] or an estoppel,[60] and the lease which was legally dead is "revived" in some rather mysterious fashion. The Texas court has also applied a theory of ratification in the situation where recitals are made in a mineral deed to third parties recognizing the existence of an oil and gas lease where that lease had previously expired by its own terms.[61]

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[55]A word of caution to the effect that this rule of construction should not be blindly followed may be found in 2 SUMMERS, *op. cit. supra* note 3, § 372, pp. 270-284. This rule of interpretation is the opposite of that applied in ordinary conveyances where the rule is that in cases of doubtful context, an ordinary deed is construed against the grantor because the words of the deed are regarded as the words of the grantor. 4 TIFFANY, *op. cit. supra* note 12, § 978, p. 58. The Mississippi Supreme Court has applied this latter rule (favoring the grantee) in a case involving a mineral *deed,* as distinguished from a lease, and the court has also favored the grantee where the deed conveys the surface estate, but purports to except all or part of the mineral estate. Gulf Refining Co. v. Stanford, 30 So.2d 516 (Miss. 1947); Allen v. Boykin, 24 So.2d 748 (Miss. 1946); Fatheree v. McCormick, 24 So.2d 724 (Miss. 1946); Richardson v. Moore, 198 Miss. 741, 22 So.2d 494 (1945).

[56]This statement is subject to the qualification stated *infra* p. 306.

[57]MISS. CODE ANN. (1942) § 264.

[58]MISS. CODE ANN. (1942) §§ 831 *et seq.*

[59]See WALKER, *loc. cit. supra* note 4, 8 TEXAS L. REV. 483, 531 (1930).

[60]Mitchell v. Simms, 63 S.W.2d 371 (Tex. Comm. App. 1933).

[61]Humble Oil & Refining Co. v. Clark, 126 Tex. 262, 87 S.W.2d 471 (Tex. Comm. App. 1935).

Needless to say, the Texas view as to the operative effect of late payment of delay rentals has been forcefully criticized.[62] The argument may be summed up as follows: Admittedly there are cases where it has been held that the true owner of land may be estopped to assert his title even where such estoppel appears to run directly *contra* to the statute of frauds.[63] Nevertheless, an essential element of equitable estoppel is missing in the usual situation involving late oil and gas rental payments, and that missing element is ignorance on the part of the beneficiary of the estoppel of the lack of truth of the representation made by the party to be estopped. Thus the doctrine of equitable estoppel could be applied only where the lessee is unaware that an attempted timely payment of delay rentals was not actually received by the lessor, and thereafter the lessor without objecting lets the lessee spend money and effort in developing the premises. However, as noted in the paragraph immediately preceding, the Texas courts have given the doctrine of estoppel (also waiver and ratification) a much broader application in construing the "unless" clause of an oil and gas lease.

In a somewhat analogous situation the Mississippi Supreme Court has found that the questions of estoppel and ratification present rather difficult problems in connection with issues raised by the execution of a mineral lease; however, the Mississippi Court has evinced a stricter attitude than have the Texas decisions. In the case of *Gulf Refining Co. v. Travis*,[64] *X* conveyed a tract of land to his daughter in 1932, but she failed to record her deed until 1942. In 1937 *X* executed a mineral lease with a ten-year primary term to Gulf Refining Co.; the lease covered three tracts of land including the tract which *X* had previously conveyed to his daughter. The daughter did not give her consent nor did she know of the lease in question. Delay rentals were seasonably paid by Gulf for seven years in accordance with the terms of the lease, but the daughter had no knowledge that these payments were made. In 1940 *X* and his wife became invalids, and their son, a lawyer, took over the management of his parents' business affairs. The son accepted and cashed delay rental checks paid by Gulf in 1941, 1942, 1943 and 1944, but he testified that he did not know that the daughter's tract of land was covered by the Gulf lease until late in 1944. In the meantime, in 1943, the daughter had quitclaimed to the son her interest in the tract which she had acquired from her father; the son brought suit in 1945 to cancel the lease as a cloud on his title.

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[62]See WALKER, *loc. cit. supra* note 4, 8 TEXAS L. REV. 483, 530-533 (1930).

[63]See 3 POMEROY, EQUITY JURISPRUDENCE §§ 807, 821, pp. 201-204, 258 (Symons' 5th ed. 1941).

[64]29 So.2d 100 (Miss. 1947), suggestion of error overruled 30 So.2d 398 (1947).

So far as estoppel was concerned the Court indicated that the doctrine was not applicable for "several reasons,"[65] but the only reason that the Court felt it necessary to give was that there had been no change of position or alteration of Gulf's position in reliance upon the acts of the plaintiff. Thus, it was considered that one of the elements of equitable estoppel was lacking, and for that reason the defendant could not rely on that doctrine as a defense.

So far as ratification was concerned, the Court held that this doctrine had no application to the situation in the *Travis* case inasmuch as *X* had not claimed to be acting as the agent of his daughter, but instead he had executed the lease in his own name and own right. On suggestion of error, the prevailing opinion correctly sought to confine the doctrine of ratification to agency problems, and for the first time in the case the statute of frauds was mentioned as being relevant to the issue. The Mississippi statute of frauds[66] specifically requires that written authority be given by the principal to the agent where the latter is authorized to do any act which is within the statute. And where (as in Mississippi at present) the original authority to make contracts for the sale or leasing (for more than one year) of land belonging to the principal is required to be in writing, it is uniformly held that the unauthorized making of such contracts can be subsequently ratified only by writing.[67] Thus in spite of the fact that neither party pleaded the statute in the *Travis* case,[68] it seems clear that the statute of frauds, as well as the statutes relating to conveyances are apropos because the Court's assertion that an oil and gas lease passes to the lessee a determinable fee in the mineral estate mean that a mineral lease is a conveyance.[69] This means that there must be some explanation made as to how the legal title to the minerals passed from the true owners to the Gulf Refining Company. The dissent to the original opinion apparently treats the problem as that of estoppel or ratification of an ordinary contract without any consideration as to whether or not a question of land titles is involved.

The case of *Koenig v. Calcote*,[70] relied on by both dissents is clearly not decisive because in the *Koenig* case the instruments in question were actually signed by the complainants, and there was no question of whether the statute of frauds or the conveyancing statutes were violated, but only the question of whether or not an instrument, already executed and re-

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[65] *See* Gulf Refining Co. v. Travis, 29 So.2d 100, 103 (Miss. 1947).
[66] Miss. Code Ann. (1942) § 264.
[67] 2 Mechem, A Treatise on the Law of Agency § 427, p. 313 (2d ed. 1914).
[68] 30 So.2d 398, 409 (Miss. 1947).
[69] *Supra* note 9.
[70] 25 So.2d 763 (Miss. 1946).

corded, should be set aside because of fraud. To the same effect is the federal case of *Guice v. Burrage.*[71] The decision of *Merchants & Manufacturers Bank v. State*[72] is also relied on by the second dissent. In that case it was properly held that the person who owned land prior to a void tax sale of the land could not recover the rentals paid under an oil and gas lease made by a bank which had derived its title to the premises from the purchaser at the void tax sale. The *Merchants & Manufacturers Bank* case is thus stronger authority for the majority ruling in the *Travis* case. The dictum in that case in regard to ratification is clearly not necessary to the decision.

Although the position of the Mississippi Court is not certain as yet on the question of the application of the doctrines of estoppel and ratification to the mineral lease, in view of the *Travis* case it is probable that the Court will not overlook the fact that questions of land titles and ownership of vested estates are involved in Mississippi mineral leases, and that in the future the terms of estoppel and ratification will not be applied with the laxity which is often the case where contracts not relating to land are involved.[73]

As another solution to the problem created by late acceptance of delay rentals, it has been suggested that the doctrine of part performance of a parol contract could be invoked where the lease has expired by its own terms, yet the parties' actions show that they still consider the lease to be in effect.[74] The rationale of this theory would be that the acceptance of late delay rentals would give rise to an implied agreement to reconvey the leasehold estate, subject to the terms of the former written lease. Then, the act of the lessee in taking possession and drilling a well would be enough part performance to take the parol implied agreement out of the statute of frauds. Again, this theory would have the effect of continuing the lease in force in comparatively few of the situations which the Texas courts allow under their estoppel, waiver or ratification theory. Also in this connection should be noted the "settled doctrine" of the Mississippi Supreme Court to the effect that part performance will not take a parol sale of realty out of the statute of frauds.[75] Thus for the Mississippi Court to adopt the part performance theory in this situation would require either a reversal of its attitude toward the effect of part performance on the statute of frauds, or an

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[71]156 F.2d 304 (C.C.A. 5th 1946).
[72]25 So.2d 585 (Miss. 1946).
[73]*See* Gulf Refining Co. v. Travis, 30 So.2d 398, 401 (Miss. 1947).
[74]*See* WALKER, *loc. cit. supra* note 4, 8 TEXAS L. REV. 483, 532-533 (1930).
[75]Wells v. Brooks, 24 So.2d 533 (Miss. 1946); Milam v. Paxton, 160 Miss. 562, 134 So. 171 (1931); Howie v. Swaggard, 142 Miss. 409, 107 So. 556 (1926).

overthrow of its holding that the ordinary oil and gas lease in use today constitutes a *conveyance* of a determinable fee in the minerals. It seems likely that the Court will reverse itself on neither stand, and it is submitted that the Court should hold that the lease is terminated where delay rental payments do not meet the exact requirements set forth in the delay rental clause, or one of the clauses relating thereto; the only exception should be where all the elements of true equitable estoppel are present.[76]

It seems that once the court is committed to the doctrine that a mineral lease is a conveyance, it should keep in mind the policy behind the formal requirements of the statute of frauds and statutes relating to conveyances and should strive for certainty in titles to realty where possible. The vague and undefined "revival" doctrine applied by the Texas courts leads to a great deal of uncertainty in regard to title to the mineral estate, which is often the most valuable estate existing in a particular tract of land. Of course it is another question if a clause is placed in the lease providing that late acceptance of delay rentals, or acquiescence by the lessor in the drilling of a well would operate to keep the lease in effect. In that event the court should give effect to the express terms of the agreement. Otherwise, it does not seem too great a hardship on the lessee, who is usually no novice in the oil industry, to require him to comply literally with the terms of the lease, or else require a written contract of extension from the lessor before paying rentals or commencing operations after a default.

A fairly recent Texas case dealing with payment of delay rentals creates opportunities for uncertainties in oil and gas titles in another respect. In the case of *Gulf Production Co. v. Continental Oil Co.*[77] the court allowed the admission of parol evidence to prove that prior to the due date for payment of delay rentals the lessors had accepted certain property in lieu of the money rental, and it was held that this did not amount to a parol modification of the "unless" clause. It is believed that this is another instance in which the Texas court has not stood by its holding that the "unless" clause is one of special limitation. The general rule is that where there is a parol variation of a contract within the statute of frauds, the oral modification is unenforceable.[78] It is true that if the

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[76]For an enumeration and discussion of these elements see 3 POMEROY, *op. cit. supra* note 63, § 805 *et seq.*, p. 191 *et seq.*

[77]139 Tex. 183, 164 S.W.2d 488 (1942).

[78]2 WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 593, p. 1705 (Rev. ed. 1936).

agreement as orally modified has been performed, the performance operates as a satisfaction of the liability on the original contract.[79] However, it seems that this exception would not be apropos in construing the "unless" clause of a mineral lease, since that clause does not give rise to a contractual *obligation,* but is instead a clause of special limitation relating to the length of time or duration for which the estate is granted. Surely, no court would give effect to an oral modification of the words of general limitation (*i.e.,* "To *A* and his heirs or assigns") in a conveyance, and it is just as illogical to allow parol variation of clauses of special limitation. The holding of the *Gulf Production* case certainly opens another avenue of uncertainty, not to mention the possibility of fraud on a lessor once one of the principal provisions in a conveyance is permitted to be proved by parol evidence.[80]

### The Granting Clause

There are two main types of granting clauses in use in Mississippi today. The first grants to the lessee the "exclusive right" to explore, drill and produce minerals from the land. The second, and the one most frequently used, grants, leases and lets exclusively the land to the lessee for the purpose of exploring, drilling and producing the minerals. The Texas court has held that the operative effect of both of these types of granting clauses is the same, *i.e.,* both have the effect of granting to the lessee a determinable fee in the mineral estate.[81] The Texas court has further held that the devotion of the land to oil and gas exploration, development and production is a special limitation, and the cessation of the use of the land for such purposes operates *ipso facto* to terminate the leasehold estate.[82] It is extremely doubtful if this is a valid interpretation of the granting clause.[83]

The fact that a deed states the purpose (and the *only* purpose) for which the grant is made is not ordinarily interpreted to give rise to defeasible fee,[84] and the Mississippi cases are in accord with this general rule.[85] Moreover, our statutes provide:

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[79] *Id.* at pp. 1705-1706.

[80] *See* 21 Tex. L. Rev. 326, 330 (1943).

[81] Stephens County v. Mid-Kansas Oil & Gas Co., 113 Tex. 160, 254 S.W. 290, 29 A.L.R. 566 (1923).

[82] Stephens County v. Mid-Kansas Oil & Gas Co., *supra* note 71; W. T. Waggoner Estate v. Sigler Oil Co., *supra* note 41.

[83] "It is believed that an examination of the authorities will reveal that in no case, except the Texas cases construing oil and gas leases, has it ever been held that the purpose for which a grant was made constituted a limitation upon the estate conveyed in the absence of an express statement of such purpose in the deed." Walker, *loc. cit. supra* note 4, 8 Tex. L. Rev. 483, 496 (1930).

[84] 1 Tiffany, *op. cit. supra* note 12, § 192, pp. 311-313.

[85] Nicholson v. Myres, 170 Miss. 441, 154 So. 282 (1934); Soria v. Harrison County, 96 Miss. 109, 50 So. 443 (1909); Memphis & C. R. v. Neighbors, 51 Miss. 412 (1875); Gadberry v. Sheppard, 27 Miss. (5 Cushm.) 203 (1854).

> Every estate in lands granted, conveyed, or devised, although the words deemed necessary by the common law to transfer an estate of inheritance be not added, shall be deemed a fee-simple if a less estate be not limited by express words, or unless it clearly appear from the conveyance or will that a less estate was intended to be passed thereby.[86]

Thus, if a lease is considered a conveyance, the terms of this statute should apply. Nowhere in the Mississippi Producers 88 form lease can there be found a provision clearly showing that the parties intended the purpose clause to be a special limitation, or even a condition subsequent. In fact other definite methods providing for termination are specifically set forth, which under the *expressio unius est exclusio alterius*[87] rule of construction, would seem to lead to the result that no other method of termination was intended by the parties. In this connection some leases provide:

> The breach by Lessee of any obligation arising hereunder shall not work a forfeiture or termination of this lease, nor cause a termination or revision of the estate created hereby nor be grounds for cancellation hereof in whole or in part save as herein expressly provided.

Since this provision is phrased in terms of "breach of obligation", it would have no effect on the special limitations in the habendum and "unless" clauses. If this clause were changed to read: "This lease shall not terminate for any cause except as herein expressly provided," this would give the courts express contractual grounds for holding that the purpose clause does not give rise to a special limitation.

There are other objections to the holding that the granting or "purpose" clause is a clause of special limitation, but space will not permit their detailed discussion here. The arguments against the Texas view have been ably and thoroughly presented elsewhere.[88] However, it should be noted that the provisions of the leases used in Mississippi today state in detail the exact development steps required of the lessee in order to keep the lease in force, and thus little opportunity is afforded either during the primary term or thereafter for the termination of the lease because of the happening of the event in the granting clause which the Texas courts hold to be a special limitation.[89] It is submitted that the purpose

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[86]Miss. Code Ann. (1942) § 833.

[87]See 15 Words and Phrases 765-766 (Perm. ed. 1940). Probably the most famous application of this rule of interpretation is found in Marbury v. Madison, 1 Cranch 137 (U.S. 1803).

[88]Walker, *loc. cit. supra* note 4, 8 Tex. L. Rev. 483, 493-511 (1930).

[89]*Id.* at pp. 508-511.

clause should not be held by the Mississippi Court to be a clause of special limitation; however, should the Texas view be followed it would have little operative effect in Mississippi because the specific provisions of the vast majority of leases used in the state today leave few occasions for the purpose clause to operate as a special limitation.

## Conclusion

By considering the oil and gas lease to be a type of conveyance, the Court at once makes the task of the Mississippi lawyer easier because it affords him a familiarity with many oil and gas problems which are not different from real property law. For example the ordinary rules of conveyancing apply with equal force to the oil and gas lease in respect to problems relating to requirements of form,[90] acknowledgment,[91] recordation,[92] satisfying the statute of frauds and statutes relating to conveyances,[93] necessity for delivery,[94] requirement of consideration,[95] the doctrine of *lis pendens,*[96] the doctrine of after-acquired property,[97] estoppel by deed,[98] the capacity of the parties,[99] homestead problems,[100] description of land,[101] and perhaps other matters.

However, it has been seen that in applying the determinable fee theory to the Mississippi mineral lease, it is constantly necessary to keep in mind the differences in operative effect between a special limitation and a condition subsquent, and also to distinguish these from a covenant. Otherwise, incongruous reasoning and results may be expected. For the Mississippi Court to abandon at this stage the determinable fee theory would lead to a great amount of confusion and uncertainty. It should be recognized that this theory is definitely a minority view in the construction of oil and gas leases; this need not deter the court, but it should keep in mind when considering cases from other states that basically a different approach to the problem is made by the majority of other jurisdictions.

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[90]Hager v. Stakes, 116 Tex. 453, 294 S.W. 835 (1927).

[91]*See* Roach v. Junction Oil & Gas Co., 72 Okla. 213, 179 Pac. 934, 935 (1919).

[92]Requa v. Joseph, 225 S.W. 585 (Tex. Civ. App. 1920); *cf.* Gulf Refining Co. v. Harrison, 30 So.2d 44 (Miss. 1947).

[93]*Supra,* p. 310.

[94]Bell v. Rudd, 144 Tex. 491, 191 S.W.2d 841 (1946).

[95]Jones v. Bevier, 59 S.W.2d 945 (Tex. Civ. App. 1933).

[96]*See* Grantham v. McCaleb, 30 So.2d 312 (Miss. 1947); Burt v. Deorsam, 227 S.W. 354, 356 (Tex. Civ. App. 1921).

[97]Texas Pacific Coal & Oil Co. v. Fox, 228 S.W. 1021 (Tex. Civ. App. 1921).

[98]Texas Co. v. McMillan, 13 F.Supp. 407 (D.C. Tex. 1935).

[99]*See* Note, 13 Miss. L.J. 453 (1941); *cf.* Pike County v. Bilbo, 198 Miss. 775, 23 So.2d 530 (1945).

[100]13 *id.* at pp. 462-463.

[101]*Supra* note 8. *See* Cummings v. Midstates Oil Corp., 193 Miss. 675, 9 So.2d 648 (1942).

# SEARCH AND SEIZURE

*Edgar J. Stephens, Jr.**

## I. Constitutional Guaranty, Its Purpose

The guaranty of protection against unreasonable search and seizure is insured to the people of Mississippi under the Fourth Amendment of the Constitution of the United States and under Section 23, Article 3 of the Constitution of Mississippi. This guaranty is designed to prevent violations of private security of person and property and unlawful invasions of the sanctity of the home of the citizen by officers of the law, acting under legislative or judicial sanction, and to give a remedy against such usurpations when attempted.[1]

The Fourth Amendment to the United States Constitution operates solely upon the actions of the federal government and its agencies.[2] The state, therefore, is limited in regard to searches and seizures only by its own constitutional provisions, which are restricted to the activities of its agencies alone.[3] Thus neither the Fourth Amendment of the U. S. Constitution nor Section 23 of the Mississippi Constitution are directed against acts of a private citizen, and the acts of a private individual in wrongfully searching the effects of a person do not exclude the evidence obtained by such search.[4]

The principle is fundamental that constitutional provisions should receive a liberal interpretation in favor of the citizen, especially in regard to those matters designed to safeguard his liberty and security as to both person and property. Since the proceeding is a drastic one, statutes authorizing searches and seizures or search warrants must be strictly construed against the State and favorably construed to the citizens thereof.[5]

## II. Reasonable Search and Seizure Construed

Section 23 of the Mississippi Constitution, practically a rescript of the Fourth Amendment, does not prohibit all searches and seizures; nor

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[1]Burdeau v. McDowell, 256 U.S. 465 (1921).

[2]Tucker v. State, 128 Miss. 211, 90 So. 845 (1922).

[3]McLemore v. State, 178 Miss. 525, 172 So. 139 (1937); Hampton v. State, 132 Miss. 154, 96 So. 165 (1923); *Compare* Little v. State, 171 Miss. 818, 159 So. 103 (1935).

[4]Colburn v. State, 175 Miss. 704, 166 So. 920 (1936); Davis v. State, 175 Miss. 324, 166 So. 761 (1936); Cutrer v. State, 161 Miss. 710, 138 So. 343 (1931); Hampton v. State, *supra* note 3.

[5]Jones v. State, 170 Miss. 741, 15 So. 416 (1934).

does it, in express terms, require a warrant therefor. It prohibits: first, unreasonable searches and seizures; and second, the issuance of warrants without probable cause, supported by oath or affirmation, specially designating the place to be searched and the person or thing to be seized.[6]

An unreasonable search is an examination or inspection, without authority of law, of one's premises or person with a view to the discovery of stolen, contraband or illicit property or for some evidence of guilt to be used in the prosecution of a criminal action.[7] Not all searches and seizures are prohibited, those that are reasonable not being forbidden, hence to unreasonable searches and seizures alone do these provisions apply. It is generally held that all illegal searches and seizures are unreasonable under the constitutional provisions while lawful ones are reasonable.[8] The reasonableness of a search or seizure is not determined either at common law or under our statutes by the presence or absence of a warrant therefor. It is a judicial question, to be determined by the court in each case, taking into consideration the place searched, the thing seized, the purpose for, and the circumstances under which the search or seizure was made, and the presence or absence of probable cause therefor.[9]

### III. Subjects of Protection and Prohibition

The language of our Constitution is somewhat broader than the words "papers or effects" of the Federal Constitution, and, applying the principle of liberal construction which governs in cases affecting the liberty and property of the citizen, our Constitution extends the protection against unlawful search to all of the property and possessions of a citizen, and no part of his property can be invaded and searched without a search warrant.[10] Therefore, property not designated for search in the search warrant may not be searched under the warrant. If the place to be searched is a room rented by a person within the house of another, then that particular room must be designated[11] and a lawful search may not be made of premises leased by defendant and not described in the warrant.[12] For example, where the affidavit and search warrant

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[6]Moore v. State, 130 Miss. 116, 103 So. 483 (1925).
[7]Note, 101 Am. St. Rep. 329 (1904).
[8]*See* note 6 *supra.*
[9]*Ibid.* Cases in which facts did not show probable cause: Elardo v. State, 164 Miss. 628, 145 So. 615 (1933); Smith v. State, 160 Miss. 56, 133 So. 240 (1931). *See* facts in Lenoir v. State, 159 Miss. 697, 132 So. 325 (1931).
[10]Falkner v. State, 134 Miss. 253, 98 So. 691 (1924); Helton v. State, 136 Miss. 622, 101 So. 701 (1924).
[11]Brewer v. State, 142 Miss. 100, 107 So. 376 (1926).
[12]Barnard v. State, 155 Miss. 390, 124 So. 479 (1934).

describe the place to be searched as a building occupied as a residence, no search can be made of the grounds or of an outhouse situated on the same premises with the residence.[13]

Except as incident to a lawful arrest or upon invitation or consent, a search, without a warrant, of the portable personal effects in the immediate possession of their owner is illegal;[14] the same rule applying to the search without warrant of an object dropped by defendant while fleeing from an arrest which the officer had no authority to make.[15] Our court, through Mr. Justice Holden, has said:

> The private personal possessions of a citizen cannot be searched unless a warrant is first secured to make the search; and we consider packages in the possession of a person, such as suitcases, grips, bundles of wearing apparel, etc. are private personal possessions which cannot be searched without a warrant, unless the party is first lawfully arrested.[16]

This was a case in which a negro on horseback was seen to reel and there was strong reason to suspect that there was whisky near by; search of a jumper which hung from the horn of the negro's saddle, disclosed whisky within the bundle. Since the officer did not first arrest the negro and did not have a search warrant for the bundle, the search was held to be unlawful. If the personal possessions are voluntarily abandoned by the owner and their possession denied, the above rule does not apply;[17] but where someone is carrying luggage for a person who follows a few paces behind, the property is within the possession of the one carrying it and he is entitled to assert the guaranty against unlawful search.[18]

## IV. Who May Claim Immunity From Illegal Search

Since the immunity from unreasonable searches and seizures is a privilege personal to those whose rights thereunder have been infringed, they alone may invoke it against illegal searches and seizures.[19] Thus one

[13]Deaton v. State, 137 Miss. 164, 102 So. 175 (1924) (search of outhouses under warrant for search of specified building invalid); Fatimo v. State, 134 Miss. 175, 98 So. 537 (1924) (warrant for search of building held not to authorize search of yard); Taylor v. State, 134 Miss. 110, 98 So. 459 (1924).

[14]Webb. v. Town of Sardis, 143 Miss. 92, 108 So. 442 (1926) (unlawful search where officer took suitcase from hand of negro who was not under arrest and search disclosed liquor in suitcase).

[15]Butler v. State, 135 Miss. 885, 101 So. 193 (1924).

[16]Canteberry v. State, 142 Miss. 462, 107 So. 672 (1926).

[17]Ross v. State, 140 Miss. 367, 105 So. 846 (1925).

[18]Webb v. Sardis, 143 Miss. 92, 108 So. 442 (1926).

[19]Cofer v. State, 158 Miss. 493, 130 So. 511 (1930).

cannot complain of an illegal search and seizure of premises or property which he neither owns nor leases nor lawfully occupies, nor rightfully possesses or in which he has no interest.[20] Our court has said that the defendant must at least have a right of possession of the invaded premises that would make him owner for the time being;[21] but when a person disclaims interest in the premises or possessions searched or abandons the article searched, he cannot question the legality of the search and seizure.[22]

If there has been an invasion of the private rights of one who is domiciled in another's house as an employee or a guest, he may assert the guaranty, though he may not otherwise complain of an unauthorized search of the premises or possession of the employer or host.[23] A temporary guest at a house, though, cannot raise the question of immunity of the house from an illegal search,[24] nor may a mere passenger object to a search of the cab of a truck in which he is riding.[25] One who occupies and controls the premises by permission of the owner, though he pay no rent, may assert the guaranty.[26]

The relationship of husband and wife being such that they both possess the premises of the home in which they live, regardless of which one may rent or own it, the wife may complain of an illegal search of such premises, even though the premises were the possession of her husband.[27] By the same tenor, evidence obtained on search was held admissible against the wife of an occupant who was named in the affidavit and search warrant;[28] a child, however, cannot complain of the search of premises of a parent.[29] A search of the person of a wife does not give the husband, who claims no interest in what was taken, any right to complain of its illegality.[30]

Evidence obtained on search of a defendant's residence under search warrant issued against others who occupied the home with him is inadmissible against the defendant[31] and this is true though legal title to the

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[20]McLemore v. State, 178 Miss. 525, 172 So. 139 (1927); Pickett v. State, 155 Miss. 386, 124 So. 364 (1929).

[21]Brown v. State, 192 Miss. 314, 5 So.2d 426 (1942); Lucas v. Oxford, 134 Miss. 771, 99 So. 510 (1924); Lee v. Oxford, 134 Miss. 647, 99 So. 509 (1924).

[22]Ross v. State, 140 Miss. 367, 105 So. 846 (1925).

[23]Alvau v. U.S., 33 F.2d 467 (1929).

[24]Barton v. State, 165 Miss. 355, 143 So. 861 (1932).

[25]Smith v. State, 198 Miss. 788, 24 So.2d 85 (1945).

[26]Davis v. State, 144 Miss. 551, 110 So. 447 (1926).

[27]Brewer v. State, 142 Miss. 100, 107 So. 376 (1926).

[28]Cox v. State, 146 Miss. 685, 112 So. 479 (1927).

[29]Roberts v. State, 153 Miss. 622, 121 So. 279 (1929).

[30]Nelson v. U.S., 19 F.2d 522 (1927).

[31]Harrell v. State, 140 Miss. 737, 106 So. 268 (1925).

land is in his wife.[32] However, where premises are leased or rented to another and in the possession of such lessee or tenant, the owner may not complain of an unauthorized search made thereupon, although the lessee claiming possession of the property may of course do so, but only to that part of the premises over which his lease extends.[33]

## V. Waiver and Consent

The constitutional immunity from unreasonable searches and seizures, being a personal privilege, may be waived by the person whose right is affected but waiver cannot be given by agent, parent, relative or wife.[34] A federal court decision has held that where two persons have an equal right to the premises, one of them may invite or consent to a search of such premises;[35] and Texas has applied this rule to allow a search of the premises where consent is given by either husband or wife, if they are equally in control and management of the premises.[36] In order to constitute a valid waiver, it must be clearly shown that consent given to an otherwise illegal search was voluntary and not merely given to avoid resistance. The Mississippi rule, as stated in Smith v. State,[37] is:

> An occupant is not required expressly to protest and object to the search of his premises without a warrant and will not be deemed to have waived the requirement of a warrant, unless it clearly appears that he voluntarily permitted or expressly invited and agreed to the search, being cognizant of his right in the premises.

Statements to an officer armed with a warrant or claiming to have one, although apparently showing free consent to the proposed search, are construed as evidence of an intention not to resist the search under the warrant,[38] provided the warrant is legal.[39]

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[32]Brown v. State, 192 Miss. 314, 5 So.2d 426 (1942); Sanders v. State, 141 Miss. 615, 106 So. 822 (1925).

[33]Barnard v. State, 155 Miss. 390, 124 So. 479 (1929).

[34]Cofer v. U.S., 37 F.2d 677 (1930).

[35]Driskill v. U.S., 281 Fed. 146 (1922).

[36]Bannister v. State, 112 Tex Cr. 158, 15 S.W.2d 629 (1929).

[37]133 Miss. 730, 98 So. 344 (1923).

[38]Boyd v. State, 164 Miss. 610, 145 So. 618 (1933). *Accord:* Lancaster v. State, 188 Miss. 347, 195 So. 320 (1940) (that defendant neither objected nor consented to search for liquor did not constitute waiver of legal search warrant); Morton v. State, 136 Miss. 284, 101 So. 379 (1924) ("All right, go ahead," stated by defendant to officer who had informed defendant that he had a search warrant did not show a voluntary invitation).

[39]State v. Watson, 133 Miss. 796, 98 So. 241 (1923).

## VI. Searches and Seizures Illegal Ab Initio

If a search and seizure is illegal at its inception, it cannot become legalized by what it brings to light;[40] it being against such search, on the chance of discovery, that the constitutional guaranty was intended to protect the people;[41] nor will a subsequent admission or confession of accused legalize a search illegal at its inception.[42] Moreover, if an unlawful search and seizure is commenced and during its progress or thereafter a search warrant is produced, it will not render valid the search invalid from its inception.[43] Finally, though evidence obtained by an illegal search is inadmissible, any error committed in the admission of this evidence cannot be complained of where defendant testified in his own behalf and admitted the only fact which the state had proven as the result of unlawful search.[44] This is true for in voluntarily testifying he waived illegality of search and seizure.[45]

## VII. Search Warrants

Generally speaking, a search warrant is required for a lawful search and seizure and the right to search without one is the exception. Even though an officer may not be compelled to obtain such a warrant, it is always advisable, when possible, for him to do so.[46] Search warrants are in the nature of criminal process and may be invoked only in furtherance of public prosecutions. Statutes providing for their issuance and execution are sustained, under constitutional provisions forbidding unreasonable search and seizure, only as a necessary means in the suppression of crime and the detection and punishment of criminals. Search warrants have no relation to civil process or trials and are not available to individuals in the course of civil proceedings, nor for the maintenance of any mere private right.[47]

In Mississippi, search warrants may be issued to search for stolen or embezzled goods[48] and to search for intoxicating liquor possessed in

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[40]Byars v. U.S., 273 U.S. 28 (1927), *reversing* 4 F.2d 210 (CCA 5th 1925); U.S. v. Slusser, 270 Fed. 818 (1921); Orick v. State, 140 Miss. 184, 105 So. 465 (1925); Butler v. State, 135 Miss. 885, 101 So. 194 (1924); Owens v. State, 133 Miss. 753, 98 So. 233 (1923).

[41]U.S. v. Slusser, 270 Fed. 818 (1921); U.S. v. Schultz, 3 F. Supp. 273 (1933).

[42]Turner v. State, 133 Miss. 738, 98 So. 240 (1923).

[43]Duncan v. State, 152 Miss. 209, 119 So. 179 (1928); Robinson v. State, 136 Miss. 850, 101 So. 706 (1924).

[44]Goodman v. State, 158 Miss. 269, 130 So. 285 (1930); Bowman v. State, 152 Miss. 195, 119 So. 176 (1928); State v. Watson, 133 Miss. 796, 98 So. 241 (1923); Blowe v. State, 130 Miss. 112, 93 So. 577 (1922).

[45]Bowman v. State, 152 Miss. 195, 119 So. 176 (1928).

[46]Mapp v. State, 148 Miss. 739, 114 So. 825 (1927).

[47]47 Am. Jur. 504.

[48]Miss. Code Ann. (1942) § 2576.

violation of the law.[49] Under Section 2614 of the Mississippi Code of 1942, a search warrant may be issued upon the affidavit of any credible person that he has reason to believe and does believe that intoxicating liquor is being sold, possessed, manufactured or transported in violation of the laws of the state. Upon proper affidavit being filed, any justice of the peace of the county, county judge, or the judge of the circuit court of the district, or the chancellor of the district in which the place is situated may issue a search warrant, directed to the sheriff or any constable of the county, or if in a municipality, to the sheriff or any constable or marshal or policeman therein, commanding him to diligently search any designated place or vehicle and seize said intoxicating liquor.[50]

The affidavit must state that the affiant has *reason* to believe and *does* believe[51]—his belief being based upon credible information—that one of the grounds for proceeding under Section 2614 exists in violation of the law.[52] The affidavit describes the place to be searched with a description that will clearly and certainly enable the officer to locate the place designated; however, the description need not be the technical description of a conveyance.[53] Thus an affidavit describing the place to be searched as "the dwelling house, outhouses, upon the premises . . . at 123 West Griffith street in the city of Jackson" is sufficient.[54] The affidavit should state the name of the person in possession of the premises to be searched though it may be stated that the premises are used by an "unknown occupant," provided the premises to be searched are sufficiently described to enable officers to locate premises.[55] But, the affidavit cannot request a search warrant for the premises of "John Doe" and at the same time omit a description of the premises to be searched.[56] Lastly, the affidavit must designate the person and thing to be seized.[57]

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[49]*Id.*, § 2614.

[50]*Ibid.*

[51]Bouchilion v. State, 179 Miss. 791, 177 So. 34 (1937); Morrison v. State, 140 Miss. 221, 105 So. 497 (1925); Porter v. State, 135 Miss. 789, 100 So. 377 (1924); Turner v. State, 133 Miss. 738, 98 So. 240 (1923).

[52]Bufkin v. State, 134 Miss. 1, 98 So. 452 (1923).

[53]Loeb v. State, 133 Miss. 883, 98 So. 449 (1923) (place to be searched described as "a place occupied by L. as a residence on 33rd Avenue, house no. 1009, in city of Meridian, Miss."). *Accord:* Williams v. State, 198 Miss. 848, 23 So.2d 692 (1945); Borders v. State, 138 Miss. 788, 104 So. 145 (1925); Bradley v. State, 134 Miss. 20, 98 So. 458 (1923).

[54]Banks v. City of Jackson, 152 Miss. 844, 120 So. 209 (1929).

[55]*Ibid.*

[56]Brewer v. State, 142 Miss. 100, 107 So. 376 (1926).

[57]Webb v. Sardis, 143 Miss. 92, 108 So. 442 (1926); Sanders v. State, 141 Miss. 615, 106 So. 822 (1926).

A search warrant cannot be issued except on information amounting to probable cause,[58] and mere rumor is not sufficient to constitute "probable cause."[59] The law requires that the information upon which an officer acts, when not his personal information, must be given by a credible person; the facts must be shown to be within the knowledge of the informant.

> The search and seizure of persons or property can only be authorized by strict compliance with the law; and the law requires that the information be obtained from a credible person—credible in the legal sense, as being a person whose known standing or reputation in the community for veracity and reliability entitled him to belief by a reasonably prudent person. It is *not sufficient* to show merely that the sheriff or other officer *actually believed* the information to be true.[60] (Emphasis added).

Where a search warrant is obtained, probability or probable cause is judicially ascertained by the officer issuing the search warrant. If an affidavit contains matters of fact sufficient on its face, it will be conclusively presumed that the officer inquired into the facts before the issuance of the search warrant; between the person accused and the state, the sufficiency of the facts cannot be inquired into on a prosecution based on evidence obtained by the search.[61] The issuance of the warrant being a judicial act, based upon the judgment of the judge as to the credibility of the affiant and the sufficiency of the affidavit, a search warrant cannot be issued by a clerk of the court.[62]

The search warrant shall bear the caption "The State of Mississippi" and should state the name of the county in which issued.[63] While the warrant shall be directed to the sheriff or any constable of the county, or if in a municipality, to the sheriff or any constable or marshal or

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[58]Grau v. U.S., 287 U.S. 124, 128 (1932) (a search warrant may issue only upon evidence which would be competent in the trial of the offense before a jury). *See also:* Steele v. U.S., 267 U.S. 498, 504 (1925); Wagner v. U.S., 8 F.2d 581 (1925); Giles v. U.S., 284 Fed. 208 (1922); Patton v. State, 160 Miss. 274, 135 So. 352 (1931); Smith v. State, 160 Miss. 56, 133 So. 240 (1931); Lenoir v. State, 159 Miss. 697, 132 So. 325 (1931); Story v. Greenwood, 153 Miss. 755, 121 So. 481 (1929).

[59]Jones v. State, 180 Miss. 210, 177 So. 35 (1937); Elardo v. State, 164 Miss. 628, 145 So. 615 (1933).

[60]McGowan v. State, 184 Miss. 86, 185 So. 826 (1939); Smith v. State, 160 Miss. 56, 133 So. 240 (1931). *See also* Loeb v. State, 133 Miss. 883, 98 So. 449 (1923).

[61]Armstrong v. State, 195 Miss. 300, 15 So.2d 438 (1943); Goss v. State, 187 Miss. 188, 192 So. 494 (1939); Creel v. State, 183 Miss. 158, 183 So. 510 (1938); Mai v. State, 152 Miss. 225, 119 So. 177 (1928).

[62]Porter v. State, 135 Miss. 789, 100 So. 377 (1924).

[63]Mai v. State, 152 Miss. 225, 119 So. 177 (1928).

policeman therein, it may be addressed "To Any Lawful Officer."[64] Any of the foregoing officers may act under the warrant[65] though the coroner, unless the sheriff is disqualified under Section 3906 of the Code, cannot lawfully serve it.[66] Where the governor has ordered out the militia, the militia are "peace officers" and are authorized to execute a search warrant.[67]

Though the affidavit may be made before any justice of the peace of the county,[68] the search warrant, first, must be made returnable before a justice of the peace in whose district the search is made,[69] or to the county court.[70] Since a mayor is ex-officio justice of the peace of the territory embraced in the corporate limits of the municipality, his acts as justice of the peace are valid.[71] Also, the warrant must conform to the affidavit or it is void, thus where the affidavit neither directly or indirectly referred to storehouse as the place to be searched and the search warrant described the premises as a storehouse, the variance was fatal.[72] And, finally, the search warrant must designate a return day,[73] which shall be *instanter* or at a future date.[74] It has been held that execution of a search warrant on the day following issuance "is sufficient compliance with the mandate that it be executed and returned *instanter*";[75] however, if the warrant has a fixed return day in the future, the warrant becomes *functus officio* after that date and cannot be executed.[76] Although return on the search warrant should be made at or near the time of service, the return may be made subsequently.[77]

A criminal prosecution is not begun by the affidavit for, the issuance of, or the execution of, a search warrant, but an additional affidavit, or an indictment, must be made or obtained charging the person with the particular crime of which the evidence indicates he is guilty.[78] Where

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[64]Matthews v. State, 134 Miss. 807, 100 So. 18 (1924).
[65]Keys v. State, 155 Miss. 574, 124 So. 789 (1924).
[66]Millwood v. State, 23 So.2d 426 (Miss. 1945).
[67]Seaney v. State, 188 Miss. 367, 194 So. 913 (1940); State v. McPhail, 182 Miss. 360, 180 So. 387 (1938).
[68]Miss. Code Ann. (1942) § 1806.
[69]Conwill v. State, 147 Miss. 118, 112 So. 868 (1927); Goffredo v. State. 145 Miss. 66, 111 So. 131 (1927).
[70]Watkins v. State, 158 Miss. 339, 130 So. 477 (1930).
[71]Poplarville Sawmill Co. v. Marx, 117 Miss. 10, 77 So. 815 (1918).
[72]Stephens v. State, 183 Miss. 829, 184 So. 327, 559 (1938).
[73]Buckley v. State, 150 Miss. 808, 117 So. 115 (1928); Powell v. State, 146 Miss. 677, 112 So. 738 (1927).
[74]Buckley v. State, *supra* note 73.
[75]Jordan v. State, 147 Miss. 24, 112 So. 590 (1927).
[76]Taylor v. State, 137 Miss. 217, 102 So. 267 (1924).
[77]Conwill v. State, 148 Miss. 118, 112 So. 868 (1927).
[78]Powell v. State, 196 Miss. 331, 17 So.2d 524 (1944).

the affidavit and search warrant describe the place to be searched as a building occupied as a residence, no search can be made of the grounds[79] or of an outhouse situated on the same premises with the residence.[80] For example, the finding of intoxicating liquor on the premises of the defendant by a search under a validly issued and executed search warrant gives rise to a rebuttable presumption of fact that it was in defendant's possession;[81] nevertheless, the burden rests on the state to establish the defandant's possession of the liquor where the premises and cabinet in which the liquor was found were constantly used by others.[82] The joint possession of the premises by a husband and wife make a prima facie case of the unlawful possession of liquor against Adam and not Eve.[83]

## VIII. Search Without Warrant

### 1. *Search Incident to Arrest*

Though neither statute nor common law authorizes issuance of a warrant for search of a person,[84] a search of the person is justificable where incident to a lawful arrest;[85] the arresting officer being also authorized to search the portable effects in possession of the person.[86] However, it has been held that where an arrest is made by a marshal but the search and seizure following it is made by other government agents, who have no authority to arrest or to execute a search warrant—had there been one—the whole search and seizure is unreasonable.[87] It is a general rule that a search warrant is unnecessary to make a lawful search of the place or the premises where the arrest of the person is made,[88] or of the premises upon which the officer has gone to arrest one

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[79]Fatimo v. State, 134 Miss. 175, 98 So. 537 (1923).

[80]Brewer v. State, 142 Miss. 110, 107 So. 376 (1926) (if the place to be searched is a room rented by a person within the house of another, then that particular room must be designated); Deaton v. State, 137 Miss. 164, 102 So. 175 (1924); Taylor v. State, 134 Miss. 110, 98 So. 459 (1923).

[81]Williamson v. State, 191 Miss. 643, 4 So.2d 220 (1941).

[82]Sellers v. City of Picayune, 32 So.2d 450 (Miss. 1947).

[83]Garland v. State, 165 Miss. 136, 146 So. 637 (1933); Wylie v. State, 151 Miss. 897, 119 So. 825 (1929).

[84]Duckworth v. Taylorsville, 142 Miss. 440, 107 So. 666 (1926); Comby v. State, 141 Miss. 561, 106 So. 827 (1926).

[85]Lewis v. State, 198 Miss. 767, 23 So.2d 401 (1945); Goodman v. State, 158 Miss. 269, 130 So. 285 (1930); Bird v. State, 154 Miss. 493, 122 So. 539 (1929); Robinson v. State, 143 Miss. 247, 108 So. 903 (1926).

[86]Webb v. Sardis, 143 Miss. 92, 108 So. 442 (1926).

[87]U. S. v. Mounday, 208 Fed. 186 (1913).

[88]Millette v. State, 167 Miss. 172, 148 So. 788 (1933).

though the arrest is prevented by flight of the person sought.[89] It has been ruled that:

> The right of search in such case [when a lawful arrest is made] is a limited one and does not go to the extent of searching the entire premises of the person arrested. The right of search following a lawful arrest is not so extensive as a search under a search warrant which described the premises to be searched.[90]

Also, the Mississippi court has stated that an officer:

> In seeking to arrest one charged with crime, whose arrest he is legally authorized to make, may enter and search the dwelling house of the accused, or the dwelling house of any other person when acting in good faith upon reasonable belief that the accused is in the house; and when the search by an officer is made in a reasonably necessary manner under these circumstances for the purpose only of apprehending the person whose arrest he seeks, the officer violates no right or law and is not liable for damages, and is not required to have a search warrant under our statute.[91]

### 2. *Seizure of Articles on Arrest*

An officer making the arrest has a right to search the defendant and take from his possession any evidence of the crime for which he was arrested, or any property which he may not lawfully possess, or take from his person anything which would aid him in making his escape.[92] Under this theory, our court has authorized the search and seizure, without a warrant, of an automobile in which a person was riding when arrested since the automobile might be an aid to escape, the officer could not leave the automobile where the arrest was made, and thus had to take it along.[93] This doctrine was not extended to cover the search of defendant's automobile, under an invalid warrant, while defendant was in jail for burglary.[94]

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[89]Leflore v. State, 197 Miss. 337, 22 So.2d 368 (1945); Wallace v. State, 149 Miss. 639, 115 So. 778 (1928); Ingram v. State, 146 Miss. 303, 111 So. 362 (1927).

[90]King v. State, 147 Miss. 31, 113 So. 173 (1927).

[91]Love v. State, 142 Miss. 602, 107 So. 667 (1926); Monette v. Toney, 119 Miss. 846, 81 So. 593 (1919).

[92]Bird v. State, 143 Miss. 493, 122 So. 539 (1929); Toliver v. State, 133 Miss. 789, 98 So. 342 (1923).

[93]Toliver v. State, *supra* note 92.

[94]Millette v. State, 167 Miss. 172, 148 So. 788 (1933).

### 3. *Where Thing Sought is Disclosed to Senses*

While it has been said that searching is generally a function of sight, federal courts, interpreting the federal constitutional provisions, have held that the mere looking at that which is open to view is not a search.[95] Thus mere looking into an automobile standing on a roadway does not constitute a search in any legal or colloquial sense. Our Mississippi court, while declining to expressly state that a search has not been made, has obtained the same results by stating that the Mississippi constitutional provisions against unreasonable searches and seizures do not prohibit a search without a search warrant that does not constitute a trespass.[96] Hence, the obtaining of information by the eye, where it is not aided by a trespass, does not constitute an unlawful search;[97] nor does the use of a flashlight or searchlight in aid of vision render it illegal.[98] The Mississippi court has further held that one cannot claim the immunity of the constitutional guaranty where the officer discovers, through one of his senses or inferences properly to be drawn from the testimony of the senses, that a misdemeanor is being committed in his presence.[99] Thus where an officer saw accused take whisky from his coat pocket, the subsequent arrest of accused was authorized.[100] Again, where an officer observed that defendant was intoxicated, saw a bottle in the defendant's coat pocket, and smelled whisky on him, the officer's observation was sufficient to entitle him to make an arrest without warrant for a misdemeanor being committed in his presence, although the officer did not actually see whisky in the bottle until the bottle was taken out of defendant's pocket.[101]

## X. Search of Automobile Without Warrant

Generally speaking, searches of vehicles on private premises are under the protection accorded such premises. A search warrant must be legally issued to search an automobile unless the facts of the case come within Section 2615, Code of 1942, which is an exception to the

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[95]Smith v. U.S., 2 F.2d 715 (1924) (to observe what is open and patent, either in sunlight or artificial light is not a search).

[96]Goode v. State, 158 Miss. 616, 131 So. 106 (1930).

[97]Goodman v. State, 158 Miss. 269, 130 So. 285 (1930); Williamson v. State, 140 Miss. 841, 105 So. 479 (1925).

[98]Smith v. U.S., 2 F.2d 715 (1924); Daniels v. City of Gulfport, 146 Miss. 517, 112 So. 686 (1927).

[99]Copeland v. State, 30 So.2d 509 (1947); Baldwin v. State, 175 Miss. 316, 167 So. 61 (1926); Fulton v. City of Philadelphia, 168 Miss. 30, 148 So. 346 (1933); Goodman v. State, 158 Miss. 269, 130 So. 285 (1930); Mapp v. State, 152 Miss. 298, 120 So. 170 (1929); Williamson v. State, 140 Miss. 841, 105 So. 479 (1925).

[100]Farmer v. State, 150 Miss. 776, 116 So. 884 (1928).

[101]Copeland v. State, 30 So.2d 509 (1947).

guaranty. But when a search is made without a warrant, the person making it must justify his act in so doing by proving that he had probable cause therefor.[102]

What constitutes probable cause, or sufficient evidence to constitute probable cause, are judicial questions to be determined by the court; the judgment of the officer making the search in regard to the matter is not sufficient, unless the facts, on judicial inquiry, authorize a finding that such is the situation.[103] The fact that someone in the car had drunk liquor was held not to constitute probable cause for the belief that liquor was being transported,[104] but evidence showing that officers detected alcohol odor coming from automobile has been held to establish probable cause for search.[105] Probable cause to search without warrant was adjudged where the sheriff of Hinds County was informed by an officer of an adjoining county by telephone that a car carrying liquor was approaching Jackson, giving route, description of car and tag number.[106]

The officer making the search must have probable cause therefor before beginning the search or evidence obtained thereafter is inadmissible.[107] Thus where officers, acting on information which did not constitute probable cause, pursued automobile for the purpose of searching it and saw men throwing liquor from the car, the search of the automobile began when the officers commenced to pursue it for the purpose of overtaking and searching it and the evidence thereafter obtained by them was incompetent.[108]

Mr. Justice Ethridge has stated that:[109]

> The immunity from unreasonable search, seizure, and arrest is one of the most valued liberties afforded and secured by our Bill of Rights under the state and Federal Constitutions. In order for a constitutional right to be secured to any

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[102]Moore v. State, 138 Miss. 116, 103 So. 483 (1925).
[103]McNutt v. State, 143 Miss. 347, 108 So. 721 (1926).
[104]Hamilton v. State, 149 Miss. 251, 115 So. 427 (1928).
[105]White v. State, 159 Miss. 503, 132 So. 599 (1931).
[106]Moore v. State, 138 Miss. 116, 103 So. 483 (1925). Cases holding probable cause: White v. State, *supra* note 105; Goodman v. State, 158 Miss. 269, 130 So. 285 (1930); Holmes v. State, 146 Miss. 351, 111 So. 860 (1927). Cases holding no probable cause: Smith v. State, 160 Miss. 56, 133 So. 240 (1931); Ford v. City of Jackson, 153 Miss. 616, 121 So. 278 (1929); Sellers v. Lofton, 149 Miss. 849, 116 So. 104 (1928); Hamilton v. State, 149 Miss. 251, 115 So. 427 (1928).
[107]Smith v. State, 160 Miss. 56, 133 So. 240 (1931); Ford v. City of Jackson, 153 Miss. 616, 121 So. 278 (1929).
[108]Ford v. City of Jackson, *supra* note 107.
[109]Mapp v. State, 148 Miss. 739, 114 So. 825 (1927).

> person, it must be secured to all persons under the equal protection clause of the Federal Constitution. Crime has always existed, and will probably continue to exist until the Millennium, but the constitutional liberties secured have not always existed, invaluable though they are to every person, and, to preserve them to ourselves and posterity, we must adhere to the law securing them, and make it accomplish the purpose for which such law is given.

Our court today adheres zealously to the above doctrine and while many states have relaxed and extended their laws regarding search and seizure, the liberties of the citizens of Mississippi are still carefully protected.

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# THE SOUTH'S PROGRESS IN THE FIGHT AGAINST FREIGHT RATE DISCRIMINATION†

The Sweet Potato Growers, Inc., with a starch plant at Laurel, Mississippi, during a seven months period ending February 28, 1941, paid freight charges which amounted to 21.8 per cent more in dollars than it would have had to pay had it been located in Boston, Massachusetts.[1] *A,* a producer of cigars located in Tampa, Florida, pays $2.39 per 100 pounds to move his product to St. Louis, Missouri, while *B,* a competitor located in New York City, need pay only $1.57 to move the same quantity of cigars to St. Louis, yet both *A* and *B* live equidistant from St. Louis.[2]

It is obvious that even the most casual glance at these two examples of disparity in freight rates would stimulate numerous channels of thought in the mind of any individual, regardless of his profession or station in life.[3] Indeed, it is doubtful if a more apt instance of an example of the interrelation of law and a contemporary problem could be found. It is not the purpose of this Note, however, to consider the multitudinous social, political, economic and legal problems contained in the above illustrations, nor to delve into the details of the freight rate structure.[4] Rather, its purpose is to consider first, the historical evolution of rate discrimination against the South, and second, the results of southern attacks upon rate discrimination.

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†This paper was presented in partial fulfillment of the requirements for the course in Public Utilities, University of Mississippi School of Law.

[1]Transcript of Record, States of New York, Delaware, v. United States, Supreme Court of the United States, Oct. Term, 1946, Exhibit 76, at 7981, 2383, as noted in Barton, *Economic Effects of Discriminatory Freight Rates,* 12 LAW AND CONTEMP. PROB. 521 (1947).

[2]*Id.* at 8448, 2654.

[3]The *emotional* channels of thought in the minds of the southern populace were sought to be stimulated while the case of State of Alabama v. N. Y. Central R. R. Co., 235 I.C.C. 25, 324 U.S. 439 (1945), was pending before the Interstate Commerce Commission. Governor Ellis Arnall of Georgia wrote, in notifying Georgia's attorney-general to file the above suit: "Georgia and the South have been shackled to the nation as colonial dependencies subject to economic exploitation, domination and control; . . . and Georgia and the South should be readmitted to the Union on a basis of full fellowship and equality; . . ." Alderman, *How Shall the Railroad Rate Structure be Regulated in the Public Interest?* 12 LAW & CONTEMP. PROB. 581 (1947).

[4]There are three primary intraterritorial freight rate structures in the United States: the southern, eastern (or official) and the western. Class Rate Investigation, 1939, 262 I.C.C. 447, 467 (1945). The scope of this note will be concerned only with the southern rate structure. Events occurring within the other sections will be discussed only as they have a bearing upon the development of the southern rate structure.

## The Historical Evolution of Rate Discrimination Against the South

In spite of the fact that freight rate discrimination has been a major issue in the adjustment of the South to the industrial economy of the nation, very few persons have been sufficiently informed to judge the controversy on its merits. Certainly no one could hope to be a competent analyst of the problem without a consideration of the history of the factors which caused it. The most important factor has been the fact that the railroads located in the South have always faced certain economic conditions which have continually shaped their rate structure along sectional lines.

One of the most basic of these conditions was the early importance of water competition.[5] Before the building of the first railroad in the South,[6] the dominant trading routes followed the many rivers flowing to the Gulf Coast, and thence by ship cargoes were sent to the manufacturing centers of the East.[7] While it is true that the early railroads captured an appreciable amount of this traffic, it is clear that water competition had a considerable effect on the shaping of southern railroad freight rates. In order to meet this competition, the railroads had to set rail rates at or below the water rates, and compensate the resulting loss by placing much higher rates on other freight moving from the interior regions northward.[8] Since the northern railroads did not have the navigable rivers and canals for competition, it was not necessary for them to make the long-and-short-haul discrimination, and a more even rate structure resulted in the North.

A second important economic condition which helped establish the South's sectionalized rate structure was the fact that the economic development of the South centered almost entirely around agricultural products, chiefly cotton. When the industrialized East called for these

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[5]The United States Industrial Commission's reports contain considerable testimony of witnesses to the effect that water competition was, or had been, a very potent factor: Martin Knapp, Chairman, I.C.C., 4 Rep. U. S. Industrial Commission 134, 137 (1900); M. C. Markham, Illinois Cenrtal Railroad, 9 U. S. Industrial Commission 435-436 and P. J. McGovern, Chairman, Southern Classification Committee, 9 U. S. Industrial Commission 678.

[6]An account of the development of railways in Mississippi is given in Shaw, *Early Development of Transportation Facilities in Mississippi* (Tulane Thesis 1931).

[7]Scott and Stone, *Discrimination in Freight Rates: The South Wins a Battle,* 15 Tulane L. Rev. 335, 336 (1941).

[8]In 1855 the amount of cotton carried by rail to northern ports was only 7,661 bales, but five years later, in 1860, some 380,813 bales were going by rail. The southern railroads seemed to take more traffic to the southern ports, however; for in 1855 Mobile had received 436,343 bals by river, none by rail, but in 1875 this city received 144,203 bales by river, 230,409 by rail. U. S. Bureau of Statistics, First Annual Report on Internal Commerce of the United States, 142, 145 (1876).

raw materials they could not be moved except at low rates. In order to compensate for the small margin of profit made on these low rates, the railroads charged exceptionally high rates on the small amount of non-agricultural freight moving from the South to the North.[9]

A closely related problem was the wide imbalance of northbound and southbound traffic;[10] while the South sent its raw materials to the East, it preferred the western market in purchasing its foodstuffs. The inevitable result was that this practice made the northbound freight rates higher, since the railroad would have to compensate for the empty southbound cars coming back for a fresh load of raw materials.[11]

A third factor tending to cause a high freight rate in the South was the fact that the population of the southern states was comparatively low in density. The shippers, whom the railroad had to reach, were widely scattered; hence, the railroads were forced to raise the rate of freight high enough to cover the cost of maintaining the greater ratio of track in proportion to the number of people served.[12] With the exception of port cities, the trackage of the railroads of the South served only small towns and large plantations.

In addition to all of these economic difficulties of water competition, light, bulky cargo, one-way traffic, seasonal business and sparse population, there was another factor which greatly contributed to the establishment of rate discrimination in the South. That factor was the Civil War.[13]

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[9]There is no question but that as compared with industrial products, agriculture provides an amazingly light traffic, for it produces goods only once each year. Potter, *The Historical Development of Eastern-Southern Freight Rate Relationships*, 12 LAW AND CONTEMP. PROB. 421 (1947).

John K. Cowan, president of the Baltimore & Ohio R. R., stated before the U. S. Industrial Commission, in 4 Rep. U. S. Industrial Commission 318-319 (1900): "To show the difference in the density of traffic North and South of the Potomac, take Mr. Carnegie's concern at Pittsburgh; they produce a tonnage in and out that is about 4½ times the tonnage of the entire cotton crop of the United States; . . ."

[10]Potter, *The Historical Development of Eastern-Southern Rate Relations, supra* note 9.

[11]For example, traffic to and from Nashville, Tennessee in the year 1874-75, an average year in this period, was: Southbound, 157,520 tons; Northbound, 73,410 tons. U. S. Bureau of Statistics, First Annual Report on Internal Commerce of the United States, Appendix, 29 (1876).

[12]While the population density of the South has increased tremendously since the Civil War, it still appears to be less than one-half that of the East. For example, while Mississippi had a population density of 12.86 per square mile in 1850 and 46.1 in 1940, New Jersey had a density figure of 71.46 in 1850, 553.1 in 1940. U. S. Census Office, The Seventh Census of the United States: 1850, Vol. 1, xxxii (1853); U. S. Bureau of the Census, Statistical Abstract of the United States, 1943, 6 (1944).

[13]There are several excellent histories of this period, among them: CLARK, RAILROADS AND RIVERS (1939); LAUT, THE ROMANCE OF THE RAILS (1936); HANEY, A CONGRESSIONAL HISTORY OF RAILROADS IN THE UNITED STATES, 1850-1887 (1908).

No attempt will be made in this note to consider in detail the general effects of the Civil War on southern economy; numerous volumes have been written upon the subject by competent historians. There are, however, several results of the War which should be pointed out here, since their effects are still being felt today in the southern railroad rate structure.

The most significant result of the War on the rate structure was the collapse of both state and private finance. It is clear that the wrecked and insolvent state of the southern railroads could not but cause freight rates in the South to be higher than those in the North, since that section had not been the battleground in the war, and had not suffered the drastic effects of the Reconstruction Period.[14] Furthermore, while the South was struggling for mere survival during this period, the eastern manufacturers and great financiers were capturing all the markets with their goods.[15]

Without finances, the southern railroads were not able to operate independently, and were compelled either to sell outright to the railroad companies of the North, or else borrow so heavily from northern interests that it amounted to the same thing as a sale.[16] As a result, the majority of the southern railroads were controlled by various northern railroad combines for twenty-five years after the end of the war,[17] or until the panic year of 1893, when J. P. Morgan and Company took over most of the lines. Even today all of the major railroad lines of the South are still owned and controlled by interests outside the South.[18]

In the years immediately following the Civil War the southern railroads at first attempted to rebuild by independent action. In view of the very small volume of traffic moving in the South during this period, competition was intense. Acting independently in cut-rate competition, the railroads quickly realized that none could survive. The result was the establishment of the Southern Railway and Steamship Association

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[14]The railroad boom of the North and East during and immediately following the war was so great that the period has not inaptly been called the Era of the Railroad Magnate. During this period railroad securities were, with the exception of government issues, the chief center of interest in Wall Street. DANIELS, AMERICAN RAILROADS 26 (1932).

[15]*Id.* at 27.

[16]Scott and Stone, *Discrimination in Freight Rates: The South Wins a Battle,* 15 TULANE L. REV. 335, 346 (1947).

[17]*Id.* at 348.

[18]Absentee control of southern railroad policy by "interests groups" in New York City is a fact which is well known in financial circles of the country. The two major interest groups are the J. P. Morgan block and the Kuhn, Loeb group. Creamer, *Regionalized Freight Rates,* 18 ROCKY MT. L. REV. 16 (1945).

in 1875 to apportion the traffic on a pro rata basis and to fix common rate standards.[19]

With competition no longer a factor in holding down freight rates, it was apparent that the rates would be higher under the Association scale—sufficiently higher to allow the railroads adequate profit to rebuild, as well as to accumulate enough surplus to increase original capital.

The pooling arrangement of the southern railroads spread to other sections of the country, and this policy is probably the greatest single cause of the growth of sectionalism in the rate structure.[20] These organizations of monopoly used their vast powers so ruthlessly in some instances, particularly in the mid-west, that in 1887 the Interstate Commerce Act was enacted to prevent pooling of freight rates.[21]

The Interstate Commerce Commission in its earliest days had neither the power nor the desire to fix the rates for the railroads.[22] Not wanting to go back to the undesirable arrangement of allowing each railroad to set up its own separate rate structure, the pooling organizations were in effect permitted to continue, though with certain limitations.[23]

The vital question, however, was whether the Commission would permit the associations to continue the sectional divisions which resulted from the early pools. It was natural to expect that the Commission would take steps to put into effect a uniform, *national* classification,[24] since the Interstate Commerce Act was passed to deal with the *national* economy, rather than *sectional* economy.

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[19]For an excellent account of the history of this association, see Hudson, *The Southern Railway and Steamship Association,* 5 QUAR. J. OF ECON. 70-94 (1891).

[20]JOSEPHSON, THE ROBBER BARONS (1934); 19 REP. U. S. INDUSTRIAL COMMISSION 289 (1901).

[21]The Interstate Commerce Act prescribes standards for railroad rates which in reality call for "perfection." They must not be unjust or unreasonable or unlawful in any respect "in and of themselves or in their relation to each other." 54 STAT. 900, 49 U.S.C.§ 1(4) (1940).

[22]Potter, *The Historical Development of Eastern-Southern Freight Rate Relationships,* 12 LAW AND CONTEMP. PROB. 433 (1947).

[23]*Id.* at 441. Only two years after the creation of the Interstate Commerce Commission, that organization stated that the railroads would be permitted to continue working out all the details of tariffs. Third Ann. Rep. I.C.C. 235 (1899). Even the United States Supreme Court stated that ". . . [The Interstate Commerce Act] did not take from the carriers their power to initiate rates—that is, the power in the first instance to fix rates, or to increase or reduce them." Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Railway, 284 U.S. 370 (1931), citing Cincinnati, N. O. & T. P. R. v. Interstate Commerce Comm., 162 U.S. 184 (1896), and Skinner & Eddy Corp. v. United States, 249 U.S. 557 (1919).

[24]Generally, discrimination does not apply to all freight rates charged to shippers of the South, but are directed at the *class rates.* These rates are used for a relatively small amount of the total freight traffic, but significantly apply to manufactured goods of a relatively high value. What amount the southern shipper must pay to ship a given article depends upon factors too numerous for enumeration

In 1891 the Commission recommended that a uniform classification be imposed by law, but already the Eastern region railroads had submitted a uniform classification for that region to become effective on the same day that the Interstate Commerce Act was to become law in 1887. The western railroads placed their classification on a sectional basis in 1887; the southern railroads adopted a sectional classification in 1889. These three sections which existed in 1887 still existed in 1939.[25]

Hence, the Commission did not attempt to tackle the problem of national uniformity, at least until 1939, and its activity prior to 1939 was largely confined to bringing about classification uniformity within the separate sections—that is, uniformity in intraterritorial class rates. But this intraterritorial uniformity could never prevent rate discrimination, since the different rate structures came into conflict at the boundaries of the different sections. The only action taken to "smooth out" these conflicting rate structures was the development of extremely complex interterritorial class-rate structures to handle freight moving from one section to another.[26] The result has been that a southern manufacturer who sent his products to the East had to pay his way through the gate of the rate wall of the Potomac River, while the eastern manufacturer shipping goods southward went through the same gate free of charge.

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here. In general, however, the actual freight charge that must be paid is determined by the use of two factors. One is the *first-class rate scale,* a mileage scale in which the first-class rate increases as the distance increases, but in a lesser proportion. For example, on a given first-class rate scale for a haul of 50 miles the charge would be 64 cents per 100 pounds; and for 100 miles, 83 cents. A *freight classification,* the second factor, is the class of freight in which a commodity is placed The particular class in which a given commodity is placed depends upon its various characteristics such as bulk and perishability. First class, known also as class 100, is the standard class, and the remaining classes are related to it by percentages. For instance, in the example already given an article given a class rating of second class moves at, say 85 per cent of the first-class rate, and hence the rate scale on a haul of 50 miles in this case would be 85 per cent of 64 cents per 100 pounds, and on a haul of 100 miles 85 per cent of 83 cents per 100 pounds. The other general type of rate is the *commodity rate,* which is merely a special rate on a given commodity, disregarding any classification. This type of rate is generally lower than the class rate, and includes such freight as logs, cotton, iron core, and the like. The South has not complained about this type of rate, since the low rates on this low-value, bulky type of freight is of a distinct advantage to it.

[25]In the *Consolidated Southwestern Cases,* 123 I.C.C. 203, 398 (1927), the Commission made a statement which clearly indicated its progress toward bringing about national uniformity:

"For years we have endeavored to promote uniformity in classification. Except for unification of rules and commodity descriptions, the progress in that direction has not been encouraging . . . So long as vital differences in classification exist it is impossible to bring about uniform class percentages throughout the country, but, on the other hand, until the class percentages are made more nearly uniform, progress toward uniform classification is impeded."

[26]Barton, *Economic Effects of Discriminatory Freight Rates,* 12 LAW AND CONTEMP. PROB. 513 (1947).

It may be seen from the foregoing considerations that the historical evolution of rate discrimination against the South becomes extremely complex in detail. It seems, however, to reduce itself to a relatively simple basic hypothesis: because of certain distinctive economic conditions existing only in the South, both before and after the Civil War, and because of the still prevalent sectionalized method of setting rate classifications, southern railroads have maintained a higher rate level than those in other parts of the country.

### The Results of Southern Attacks Upon Rate Discrimination

Southern shippers have long been aware that economic practices, once entrenched, are extremely difficult to dislodge. Numerous efforts have been made to convince the Interstate Commerce Commission that it should take action to equalize the interterritorial rates,[27] but not until 1934 were any major inroads made upon the evils of interterritorial rate inequality. By that time, southern leaders were certain that actual proof was available which would convince any unbiased individual or group of individuals that the discrimination against southern shippers had neither a rational nor a just basis.[28]

Early in 1934 the governors of eight southern states[29] began a series of meetings to determine an effective course of action. It was finally decided that the procedure most likely to achieve the desired results was to file a complaint before the Interstate Commerce Commission.[30] Accordingly, the governor of Alabama filed with the Commis-

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[27]As early as 1900, a freight manager of an alkali company, testifying before the Industrial Commission, exclaimed: "It [the South] should be the home of the biggest manufacturing plants in the world. Let the railroads give that country reasonable freight rates, then watch the country prosper . . . I can see no effort . . . on the part of the railroads to bring this about." 9 Rep. U. S. Industrial Commission 75 (1901).

[28]Prior to 1939 the Interstate Commerce Commission had always accepted the contentions of the Northern interests that interterritorial differences in class-rate levels were justified, on the basis: (1) that there was *proof* that transportation costs were higher in the South than in the North. Cotton, Woolen, and Knitting Factory Products, 211 I.C.C. 692 (1935); Divisions of Rates, Official and Southern Territories, 234 I.C.C. 175 (1939); (2) that there are long-standing differences in rate policy, or in the distribution of the transportation burden. Coke from Alabama to Tennessee to Central Territory, 208 I.C.C. 281 (1935); Brick and Clay Products in the South, 155 I.C.C. 730 (1929); (3) that the existing rate structures in the South are advantageous to the South. Heath, *The Uniform Class Rate Decision and its Implications for Southern Economic Development,* 12 So. Econ. J. 213, 233 (1946).

[29]Alabama, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee.

[30]Alabama v. N. Y. Central R. R., 235 I.C.C. 255 (1939). Prior to the filing of this complaint another procedure had been tried. Bills were introduced into Congress providing for equalization, but none passed either the House or the Senate. Barton, *Economic Effects of Discriminatory Freight Rates,* 12 Law and Contemp. Prob. 519 (1947).

sion, on May 26, 1937, a complaint, naming as defendants "all railroad . . . carriers operating within or to or through . . . Southern Territory . . . and New England Territory." The complaint alleged "that the rail rates on certain manufactured . . . articles from points in [the South] to destinations in [the North] are unreasonable, [and] unjustly discriminatory . . ." There then followed a list of manufactured articles on which the Commission was asked to make findings.

After a thorough examination of the evidence presented by both sides, the Commission in a 5-4 decision came to the conclusion that "the cost of transporting the articles named in the complaint from producing points in the South into the North, compared with that of transporting like articles within the North, does not justify the maintenance thereon of higher levels of rates than are applicable on like articles within the North."[31] An order followed directing the defendants to eliminate the rate discrimination on the manufactured articles named in the complaint.

The findings of the Commission were, first, that since the complainants were seeking the same mile-for-mile level of rates, and not the same rates used by Northern shippers, differences in costs of production of the competing producers should not be considered in determining transportation charges.[32]

The second important finding was that the Southern rates were unreasonable.[33] The Commission, in making this finding, considered many matters, such as revenues, expenses and operating results of the carrier concerned, traffic densities, character of the commodities carried, present and expected volume of the movement of these commodities, routes over which they must move, and the character of equipment and service required to move them. In view of the numerous factors considered, southern shippers might well have expected the Commission to find, in subsequent cases, that southern rates on still other commodities were unreasonable.

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[31]235 I.C.C. at 326.

[32]This same rule was stated once before by the Commission in Cotton, Woolen, and Knitting Factory Products, 211 I.C.C. 692, 786 (1935). The case turned upon another point, however, and the defendants in the *Southern Governors Case* apparently considered the rule merely as dictum.

[33]The Southern States Industrial Council, an organization of shippers in 15 southern states which was an intervenor in *Alabama v. N. Y. Central R. R.*, 235 I.C.C. 255 (1939), commonly known as the *Southern Governors Case,* urged that, unless it could be shown that higher rates from the South to the North than were maintained within the North were responsive to conditions in the South, and would move the traffic, and were required by the southern carriers to enable them to earn a fair return, such higher rates were prima facie unreasonable and discriminatory.

While the southern leaders were savoring the fruits of this initial major victory over freight rate discrimination, the Commission made a surprising announcement: it would make two general investigations—one concerning class rates applying in all territories east of the Rocky Mountains,[34] the other in regard to freight classifications in the entire United States.[35] Both investigations were heard together by the Commission, and have become known as the *Class Rate Investigation.*[36]

Extensive public hearings, characterized by the usual informality, were held by the Commission in numerous cities, resulting in a record of over seventeen thousand pages. The record contains detailed factual evidence covering almost every kind of rate situation, and the Commission itself caused highly technical economic, cost, and traffic studies to be made. Although the original report of the Commission contains over 160,000 words, the major findings and conclusions can be stated in four main points:

*1. Class rates within the South, and from this section to the North, are much higher, article for article, than the rates within the North.*

This conclusion was not too difficult to reach. Thousands of examples of rate inequalities were submitted by shippers throughout the South. Consideration of these many examples showed that the first-class rate scale[37] of the South was more than 37 per cent higher than the identical rate scale for the North.

*2. The existing class-rate differentials cannot be justified on the theory that costs of transportation are higher in the North than in the South.*

The Commission concluded that no major difference in transportation costs could be found to exist between the northern and southern sections, but if there were a difference, costs in the South were slightly lower than those in the North. In reaching this conclusion the Commission relied upon a cost study submitted by one of its own experts, which has been called the most comprehensive study of transportation costs ever made.[38]

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[34]Interstate Commerce Commission Docket 28300, Class Rate Investigation, 1939, 262 I.C.C. 447 (1945).

[35]Interstate Commerce Commission Docket 28340, Consolidated Freight Classification, 262 I.C.C. 447 (1945).

[36]262 I.C.C. 447 (1945).

[37]See note 24 *supra.*

[38]Miller, *Corrective Action by the Interstate Commerce Commission,* 12 LAW AND CONTEMP. PROB. 562 (1947).

*3. The fact that the railroads of the North carry a larger volume of traffic than do the railroads of the South does not justify the class-rate inequalities.*

This conclusion was obvious, since the volume moved had a relation only to the transportation costs, and it had already been found that such costs did not substantially differ.

*4. There cannot be a solution to the interterritorial rate problem unless uniformity in class rates is obtained.*

The Commission spoke at length of the necessity of reducing the freight-rate trade barriers, which were found to have impeded the movement of class-rate traffic both within the South and between the South and the North.[39] It was pointed out that uniformity of class rates within each section only could not solve the problem, since this still would not "open the gate in the rate wall at the Potomac."

As a result of its findings, the Commission ordered all southern freight rates reduced 10 per cent and northern rates raised 10 per cent.[40] Nine northern states promptly filed a petition in the District Court for the Northern District of New York to set aside the findings and actions of the Commission.[41] The case was tried on its merits in February, 1946, and subsequently the three-judge court filed a unanimous written opinion adopting all the Commission's findings of fact and upholding the action of the Commission in all respects. The court, however, stayed the effect of the Commission's order pending decision by the Supreme Court of the United States.

The North, in its appeal to the Supreme Court, set up two principal legal issues;[42] namely, the effect of the Transportation Act of 1940,[43]

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[39]It was stated by the late Joseph B. Eastman, former chairman of the Interstate Commerce Commission, ". . . an objectional phase of the railroad situation for many years has been the maintenance of . . . territorial boundary lines ("Chinese walls") where rate systems change. . . . it has been a prolific source of complaints to the Commission." Sen. Doc. No. 119, 73d Cong., 2nd Sess. 29 (1934).

[40]The Commission found *both* that rates in the North were too high and that those in the South were too low. What should be the order of the court after making these findings was a most perplexing problem. Since there is no such thing as a group of railroad rates which are just exactly right, but only a "zone of reasonableness" within which rates can be adjusted up and down, then the adjustment order of the Commission is certainly valid. Hale, *Utility Regulation in the Light of the Hope Natural Gas Case,* 44 Col. L. Rev. 488, 521 (1944).

[41]State of New York v. United States, 65 F. Supp. 856 (1946); supplementary report and order denying motions to reconsider and reopen, Class Rate Investigation, 1939, 264 I.C.C. 41 (1945).

[42]Other legal questions presented to the Supreme Court were (1) that the Commission did not make certain preliminary findings which appellants considered essential to support the ultimate findings; (2) that the less-carload rates were

and particularly the amendment to Section 3(1) of the Interstate Commerce Act, concerning the power of the Commission to remove territorial discriminations; and further, whether the report and order of the Commission were not arbitrary, as not being supported by adequate evidence.

The Supreme Court on May 12, 1947,[44] announced, in a 7-2 decision, that the decision of the New York District Court affirming the findings and order of the Interstate Commerce Commission would be upheld.

In regard to the purpose of the Transportation Act of 1940, the Court held that such Act did not introduce a new standard of discrimination, but merely made clear the purpose of the Interstate Commerce Act that regions should be the beneficiaries of the law against discrimination. The Court further construed the Ramspeck Resolution[45] as a mandate to the Interstate Commerce Commission to conduct its *Class Rate Investigation.*[46]

In deciding the issue as to whether or not the findings and order of the Commission were arbitrary, the Supreme Court held that:

1. The Commission's findings of discrimination in class rates against the South were supported by sufficient evidence.

2. There was substantial evidence on which the Commission might hold that the class-rate structure had hampered the economic development of the South.

3. The finding of the Commission that rate difference could not be justified by differences in transportation costs was amply supported by the evidence.

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confiscatory on the face of the report of the Commission; (3) that the Commission should have permitted the carriers a chance of alternative methods of removing the rate discriminations. The Commission decided all these issues against the railroads.

[43]By this act Congress amended Section 3(1) of the Interstate Commerce Act (which deals with discrimination) so as to specifically prohibit any unreasonable preference to any section. 24 STAT. 380 (1887), as amended, 49 U.S.C. § 3(1) (1940); the so-called Ramspeck Resolution directed the Commission to institute an investigation of the interterritorial and intraterritorial rates and to remove any unlawful discrimination found to exist. 24 STAT. 380 (1887), as amended, 49 U.S.C., note following § 3 (1940). For an excellent discussion of the statutory authority of the Interstate Commerce Commission, both before and after the passage of the Transportation Act, see Miller, *Corrective Action by the Interstate Commerce Commission,* 12 LAW AND CONTEMP. PROB. 550-553 (1947).

[44]New York v. United States, 331 U.S. 284 (1947).

[45]See note 43 *supra.*

[46]The Commission advised Congress, immediately after passage of the Act, that its investigations instituted in 1939 would be carried out pursuant to this mandate. 262 I.C.C. 689.

4. There was no necessity for the Commission to afford the carriers an opportunity to "abate the discrimination by raising one rate, lowering the other, or altering both."

5. The Commission had authority to remove discrimination by ordering an increase of 10 per cent in the North and a decrease of the same percentage in the South.[47]

Needless to say, this decision of the Supreme Court is one of the most important and far-reaching decisions ever rendered by that august body. Directly or indirectly, it effects virtually every person in the United States. Although it is true that the class rates involved are only segments of all the railroad rates,[48] they are the cornerstone of the entire freight rate structure. Uniformity in these rates should, eventually, lead to uniformity in all rates.[49]

Although this decision of the Supreme Court was generally expected, in view of the vast amount of evidence found by the Commission to be favorable to the South, at least one state in the South was not convinced that this type of suit was the only procedure available in combating freight rate discrimination. While the *Class Rate Investigation* was pending in the Supreme Court, the state of Georgia, in the person of Governor Ellis Arnall, started on a more fundamental course of action —a direct legal action against the railroads.

It was felt by Georgia that even should the forthcoming decision in the *Class Rate Investigation* be favorable to the South, still there were at least two other problems which would not be solved by that decision. The first of these problems was that, in general, the Interstate Commerce Commission did not set rates, but only reviewed the rates set by railroad rate-making groups.[50] That is, the Commission's power went only to the validity of rates already set up, and not to the rate-fixing groups of the railroads. Hence, even if rates were fixed by illegal rate-fixing groups, the Commission could not give relief from those rates if they were within the "zone of reasonableness."[51]

The other consideration was that Georgia feared that the Commission might in the future suffer a "relapse" back into "inaction" as far as

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[47]See note 40 *supra*.
[48]See note 24 *supra*.
[49]On July 7, 1947, petitions for rehearing in *New York v. United States* having been denied (67 Sup. Ct. 1527 (1947)), the Commission directed the railroads to proceed with the adjustments ordered in the Class Rate Investigation.
[50]It has been estimated that less than one percent of the rates made by the railroad agencies are reviewed by the Commission. WIPRUD, JUSTICE IN TRANSPORTATION 13 (1945).
[51]United States v. Chicago, M., St. P. & P. R.R., 294 U.S. 499, 506 (1935).

interterritorial rate discrimination was concerned, and in such a case Georgia and the South might again have extreme difficulty in getting through that proverbial "gate in the rate wall at the Potomac," despite the result of the *Class Rate Investigation.*

The amended bill of complaint filed by Georgia on September 15, 1944,[52] charged that there existed a conspiracy among twenty defendant railroads to fix arbitrary and non-competitive freight rates, and that the result of this rate-fixing conspiracy was to frustrate and arrest the development of Georgia's economy.[53] In short, Georgia set forth the ingenious argument that injunctive relief was being sought only against a rate-making conspiracy and not against rates made by that conspiracy. In this distinction lay Georgia's hope of victory, since rates already fixed by the alleged conspiracy were *legal,* having been approved by the Interstate Commerce Commission, and thus were not subject to be "reviewed, annulled or set aside" by the Supreme Court.[54] Georgia brought the suit in her capacity as *parens patriae,* and prayed for damages and injunctive relief.

The first question considered was whether or not Georgia could invoke the original jurisdiction of the United States Supreme Court.[55] The Court took a page from history, stating that trade barriers and intense commercial rivalries had plagued the colonies, resulting in diplomacy and war, and that these evils were subsequently sought to be eliminated by giving the Supreme Court original jurisdiction of suits between a state and citizens of another state. In rendering its decision, the majority was of the opinion that "It seems clear to us that Georgia may maintain this suit as *parens patriae* acting on behalf of her citizens . . ."[56] Actually, it would seem that the Court decided this issue without any in-point authority, although there seems to be no holding to the contrary.[57]

The entire Court was in accord that Georgia had no right to damages. It is clear, says the Court, that "Georgia may not recover damages even if the conspiracy alleged is shown to exist." The reason for this holding is that "If a shipper could recover under the antitrust act for damages resulting from the exaction of a rate higher than that which

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[52]The original bill of complaint was filed on June 12, 1944. Georgia v. Pennsylvania R. R., 324 U.S. 439, 443 (1945).

[53]*Id.* at 443, 444.

[54]Texas & Pacific v. Abilene Cotton Oil Co., 204 U.S. 426 (1907).

[55]U. S. Const., Art. III, § 2.

[56]Georgia v. Pennsylvania R., 324 U.S. 439, 450 (1945).

[57]Tally, *The Supreme Court, The Interstate Commerce Commission and the Freight Rate Battle,* 25 N.C. L. Rev. 176-178 (1947).

would otherwise have prevailed, the amount recovered might, like a rebate, operate to give him a preference over his trade competitors."[58]

In determining whether or not Georgia stated a cause of action, the Court held that a state was a *person* under Section 16 of the Clayton Act, and hence entitled to bring an antitrust suit;[59] that this suit would not lie in the Supreme Court to "review, annual or set aside an order of the Interstate Commerce Commission;"[60] and further, that the Commission does not have the power to fix rates, but only to review rates already fixed by the rate-making agencies of the railroads.[61] It is, in short, decided that Georgia's case meets all the requirements of Section 16 of the Clayton Act, and hence states a sufficient cause of action. The Court says:

> The threatened injury is clear. The damage alleged is sufficient to satisfy the preliminary requirements of this motion to file. There is no administrative control over the combination. And no adequate or effective remedy other than this suit is suggested which Georgia can employ to eliminate from rate-making the influences of the unlawful conspiracy alleged to exist here.[62]

It is clear from the foregoing that, although the case was not decided on its merits, the Supreme Court has held that it had original jurisdiction to allow the filing of a bill charging that certain carriers had coerced and controlled others in establishing discriminatory rates, and that such coercion and control, if proved, would violate the antitrust laws.

As stated, the case of *Georgia v. Pennsylvania R. R.*,[63] has not been decided on its merits. But the fact that Georgia succeeded in convincing the highest court in the land that it had original jurisdiction over such a case, and that the court could and would grant injunctive relief upon a showing of proper proof, is a great victory for the South. The underlying significance of the victory lies in the fact that in the future the South has an excellent chance of preventing rate corruption by railroad organizations. Even if Georgia or another southern state is never able to produce sufficient proof to obtain an injunction, the

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[58]Georgia v. Pennsylvania R. R., 324 U.S. 453 (1945); Keogh v. Chicago & N. W. R.R., 260 U.S. 156, 163 (1922).
[59]38 STAT. 737 (1914), 15 U.S.C. § 26 (1940).
[60]See note 54 *supra*.
[61]Georgia v. Pennsylvania R., 324 U.S. 439, 456, 489 (1945).
[62]324 U.S. 462 (1945).
[63]324 U.S. 439 (1945).

case has caused a *rude awakening* of the public,[64] the courts, the Congress, the Interstate Commerce Commission, and perhaps most important of all, the railroads' rate making organizations.

### Conclusion

It is hardly to be supposed that either one of the three major victories achieved by the South in the *Alabama v. New York Central*,[65] *Class Rate Investigation*[66] and *Georgia v. Pennsylvania R. R.* [67] cases will provide a final solution to the age-old complex problem of rate discrimination. The real significance of the *Georgia v. Pennsylvania R. R.* case cannot be determined until a decision is rendered on its merits; further, while the Interstate Commerce Commission on July 7, 1947, issued instructions to the railroads to proceed with the adjustments ordered in the *Class Rate Investigation*,[68] it is clear that, due to the complexity of the problem, years will be required for the railroads to comply. But the South has shown, by vigorous, concerted action, that rate discrimination against it cannot be justified on any basis, and having established this major premise, the South's battle is almost won, for, to paraphrase a maxim of equity, "once the right has been established, the remedy will be found."

*Moran Pope, Jr.*

## THE FEE SYSTEM IN MISDEMEANOR CASES IN THE JUSTICE OF THE PEACE COURTS IN MISSISSIPPI

It is a fundamental principle of the common law that no man shall be judge in his own case.[1] The maxim *nemo debit esse judex in propria causa* is said to apply to a case in which the judicial officer is interested, as well as to one in which he is a party.[2] Unfortunately Mississippi, and several other states maintain a policy of economy in the adminis-

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[64]A number of excellent books and articles have been written on the question as to whether the antitrust laws should apply to railroad rate-fixing agencies. For example, see Dickinson, *Railroad Rates and the Antitrust Laws*, 12 I.C.C. Pract. J. 936 (1945); Wiprud, Justice in Transportation (1945); Young, *A National Transportation Policy*, 12 Law and Contemp. Prob. 621 (1947); Drayton, Transportation Under Two Masters (1946); Smith, *Rate-making and the Antitrust Law*, 12 I.C.C. Pract. J. 1117 (1945); Arnall, The Shore Dimly Seen (1946).

[65]235 I.C.C. 255 (1939).

[66]262 I.C.C. 447 (1945).

[67]324 U.S. 439 (1945).

[68]See note 49 *supra*.

[1]The Case of the College of Physicians, 8 Co. 114 (C.P. 1610); 2 Brownl. 265 (C.P. 1610). Commonly called *Dr. Bonham's Case*.

[2]Cooley, Constitutional Limitations 870. 871 (8th ed. 1927).

tration of justice in the so-called inferior courts which has resulted in the iniquitous fee system whereby the judge or justice is partially compensated from costs imposed in case of conviction of defendants for misdemeanors.[3]

The system brings the administration of justice into disrepute for a provision on the statute books which gives a pecuniary advantage or benefit to a justice in case of conviction is an obvious temptation. The community at large as well as the person penalized harbors a suspicion of unfairness and there can be no confidence in the fairness of the trial when such a statute is in force.[4] The justice of the peace court in Mississippi is a constitutional court,[5] but the fee system is of legislative derivation.[6] It is said that the purpose of such courts when established was to bring justice home to the people in small matters and provide for its cheap and convenient administration.[7] The courts most often seen and best known at the local level are these courts which try infractions of police regulations and traffic laws, handle misdemeanor cases, try small claims, and hold preliminary hearings in felony cases; and these courts from which a majority of the people derive their attitude toward law and justice, are in Mississippi admittedly administered on the basis of convenience and economy, under this fee system.

The defects of the justice of the peace courts and their attendant fee system as regards due process are not peculiar to Mississippi, but are found in most of the other states. The case of *Tumey v. State of Ohio,*[8] which reached the Supreme Court of the United States in 1927, was widely acclaimed and provoked much comment, with many writers proclaiming that the very foundation of the justice of the peace system in the United States had been shaken.

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[3]Lee, *The Constitutionality of Statutes Compensating Justices of the Peace by Costs in Civil Cases,* 13 A.B.A.J. 254 (1927), quoting Professor Thomas K. Urdahl, "Perhaps no single influence has done more injury through the American courts than the fee system in its effects on the Justice of the Peace."

[4]National Commission on Law Observance and Enforcement, Report on Lawlessness in Law Enforcement, No. 11, 329-331 (1931).

[5]Miss. Const. § 171 provides for a "competent number of justices of the peace and constables." Miss. Laws 1932, c. 475, sets a legal minimum of one in each supervisor's district and a maximum of two. See Butts, *The Court System in Mississippi,* 3 Miss. L.J. 97 (1930), and Sikes, *Judicial Administration in Mississippi,* 6 Miss. L.J. 109 (1936). There are 505 duly elected Justices of the Peace in Misisippi at the present time. Mississippi County Officers and County District Officers—Term January 1, 1948, to January 1, 1952, published by the Secretary of State, Jackson, Mississippi (1948).

[6]See Miss. Code Ann. (1942) § 3940 for schedule of fees. Subsection x of this section, as amended, provides for recovery of lost costs in an amount not exceeding one hundred dollars, to be paid out of the county treasury to the justice of the peace in all state cases in which the state fails in the prosecution.

[7]Ethridge, Mississippi Constitutions 314 (1928).

[8]273 U.S. 510 (1927).

### The Tumey Case

By statute in Ohio,[9] the mayor of a village had been given jurisdiction over liquor cases; the costs in such cases, as payment for hearing them, accrued to the mayor and other officials. This accrual was in addition to salaries received for their other official duties. If the accused was acquitted in a liquor prosection, there were no fines or costs and consequently there was no compensation for the officials in that case. Over a seven month period the particular mayor and his official associates shared $5,000.00 from liquor convictions. Appellate review from conviction was narrowly limited, being confined to questions of law presented by a bill of exceptions with no weighing of the evidence.

The Supreme Court of the United States held that the statutes, in providing for trial by the mayor of persons accused of violating the Prohibition Act of the state, deprived the accused of due process of law and violated the Fourteenth Amendment to the Federal Constitution, because of the pecuniary and other interests which these statutes gave to the mayor-judge in the result of the trial. Chief Justice Taft, in the opinion, declared:

> The requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice. Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant or which might lead him not to hold the balance nice, clear and true between the State and the accused denies the latter due process of law.[10]

In this case there was no question as to degree or nature of the interest necesary to constitute bias, for there were available other judicial officers who had no disqualification either by reason of the character of their compensation or their relation to the village government. The court recognized the existence of legislative discretion in questions of disqualification which do not involve constitutionality but the discretionary limit was clearly drawn when the court said:

> But it certainly violates the 14th Amendment and deprives a defendant in a criminal case of due process of law to subject

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[9]108 Ohio Laws, part 1, p. 388, and part 2, p. 1182; Ohio Gen. Code (1920) §§ 6212-19; 109 Ohio Laws, p. 9, § 17.

[10]Tumey v. State of Ohio, *supra* note 8, at p. 532.

> his liberty or property to the judgment of a court, the judge of which has a direct, personal, substantial pecuniary interest in reaching a conclusion against him in his case.[11]

It was further pointed out that the adjudging officer's pecuniary interest stemmed not only from the personal gain he derived from conviction, but also from the interest he had in the financial condition of the village and his responsibilities therefor as mayor. This would indicate that the doctrine of the instant case applies where convictions help the financial status of the governmental subdivision, even in the absence of personal pecuniary gain to the judge.

The counsel for the state did not deny the pecuniary interest which existed by operation of law, but did contend that in Ohio and other states, economy demanded that the only compensation which could be afforded for such inferior courts was the fees and costs earned by them. This amount, they maintained, was so small that it was not to be regarded as likely to influence the judicial officer or prejudice the defendant improperly even though the magistrate would receive nothing if there was an acquittal.[12] Tracing the common law history of similar inferior courts the Supreme Court opinion disclosed no situation analagous to the instant case but on the contrary revealed "the greatest sensitiveness over the existence of any pecuniary interest however small or infinitesimal in the justices of the peace."[13]

Thus for the first time the validity of such practice was directly raised and declared to be unconstitutional. An effort to extend the doctrine of the *Tumey* case however has met a limit imposed by the practical enforcement of justice.[14] The boundaries of this limitation are flexible according to the jurisdiction but are everywhere met with the salient democratic principle that every defendant, regardless of his guilt, is entitled to a fair trial by an impartial judge. Failing to receive this, he has been denied "due process of law."[15]

### The Tumey Doctrine In Mississippi

The fee system authorized by the legislature in Mississippi to compensate the constitutional court of justice of the peace was attacked in *Bryant v. State*.[16] The Supreme Court of Mississippi recognized the

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[11] *Id.* at 523.
[12] *Id.* at 530
[13] *Id.* at 525
[14] See note 7 *supra*
[15] Note, 13 Va. L. Rev. 584 (1927)
[16] 146 Miss. 533, 112 So. 676 (1927)

purpose of the appeal as being "an effort to have this court pass on the constitutionality of the laws of this state by which the compensation of justices of the peace, in prosecutions of misdemeanors before them, is made dependent on conviction,"[17] but refused to render a decision on this question, or even to consider the point. The appellant in that case had been convicted of violation of the game laws and sentenced to pay a fine and costs, which included fees of the justice of the peace. An appeal and trial *de novo* was had in the circuit court wherein the appellant had filed a plea in abatement setting out the denial of due process, based on interest of the justice of the peace in the outcome of the prosecution, in that his compensation for his services depended on conviction. A verdict of guilty was rendered in the circuit court, and on the appeal therefrom, Justice Anderson declared the issue raised in the *Tumey* case was not present and could not therefore be decided. Relying on pertinent clauses in Sections 165[18] and 171[19] of the Constitution of 1890 as placing the appellant in the attitude of having consented to the trial of the charge against him before the justice of the peace who tried him, notwithstanding the alleged disqualification, the court stated:

> The objection must be made before the trial, or, if made thereafter, before the judge or the justice of the peace has lost control of the judgment; and a failure to make such objection within that time is tantamount to a waiver of the disqualification of the judge or justice of the peace.[20]

The appellant in *Brown v. State*[21] failed in an effort to have the *Tumey* doctrine applied on the same ground which had been fatal to

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[17]*Id.* at 539.

[18]MISS. CONST. § 165 provides, among other things, that no judge of any court shall preside on the trial of any cause where the parties, or either of them, shall be connected with him by affinity or consanguinity, except by consent of the interested in same, except by consent of the judge and the parties.

[19]*Id.* § 171 provides: "And no justice of the peace shall preside at the trial of any cause where he may be interested, or the parties or either of them shall be connected with him by affinity or consanguinity, except by consent of the justice of the peace and of the parties."

[20]Bryant v. State, *supra* note 19, at 539, citing Dixon v. Rowland, 143 Miss. 270, 180 So. 807 (1926); Shireman v. Wildberger, 125 Miss. 499, 87 So. 657 (1921); Y.&M.V. R. v. Kirk, 102 Miss. 41, 58 So. 710 (1912); and Nimocks v. McGehee, 97 Miss. 321, 52 So. 626 (1910). *Accord:* Adams v. Slavin, 225 Ky. 135, 7 S.W.2d 836 (1928); *Ex Parte* Steele, 220 N.C. 685, 18 S.E. 132 (1942); Tari v. State, 117 Ohio St. 481, 159 N.E. 594, 57 A.L.R. 284 (1927); Brooks v. Town of Potomac, 149 Va. 427, 141 S.E. 249 (1928). *But see* Baker v. Grice, 169 U.S. 290 (1898); *Ex Parte* Baer, 20 F.2d 912 (1927), wherein petitioner failed to object seasonably to preserve his constitutional rights and permitted time within which to file appeal to pass. Federal court in granting *habeas corpus* declared that such a situation was a "peculiar emergency."

[21]149 Miss. 219, 115 So. 436 (1928).

the contention in the *Bryant* case, a failure to object seasonably. The court said, through Justice Ethridge:

> As to the plea to the jurisdiction, the case is controlled by *Bryant v. State,* in which this court held that, if no objection was made to the justice trying the case, the party, by implication, consented to be tried by such officer, and consequently was not denied due process of law, as, under section 165 of the constitution, a party may waive a disqualification of a judge and proceed to trial before him; and if he so proceeds without objection, such procedure constitutes waiver.[22]

An interpretation of the *Tumey* doctrine with respect to the constitution and laws of Mississippi was in this manner deferred until *Hitt v. State,*[23] an appeal from a conviction in a circuit court for a misdemeanor, wherein, though the record was not perfect for the purpose of such an interpretation, the court stated, "we have concluded that the constitutional questions raised by the defendant in the lower court are of such moment as to elicit from us a decision of the questions thus presented."[24] Oral proof was in the record to show what had occurred with reference to the disqualification of the justice of the peace in the trial before him and was sufficient to show a seasonable objection to the qualification of the justice. In reaching a decision that the justice of the peace was not disqualified, the prevailing opinion outlined the constitutional[25] and statutory authority for establishment of justice courts and the procedure therein, as well as provisions for jury trial, appeal with *supersedeas* bond, and trial *de novo.*[26]

The appellant contended, in this case, that because the justice of the peace would receive no costs in case of acquittal, he thereby had a pecuniary interest which was direct, certain and immediate.[27] The court relied on the statute[28] providing for payment from the county

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[22]*Id.* at 221.

[23]149 Miss. 718, 115 So. 879 (1928); followed in Foote v. State, 115 So. 886 (Miss. 1928); and Jones v. State, 115 So. 886 (Miss. 1928).

[24]149 Miss. at 725.

[25]*Id.* at 726.

[26]*Ibid.*

[27]That the objection must be seasonably made and the interest alleged must be direct, certain and immediate is incontrovertible. Cashin v. Murphy, 138 Miss. 853, 103 So. 787 (1925); Beasley v. Burt, 39 S.E.2d 51 (Ga. 1946); Tumey v. State of Ohio, *supra* note 9, at 535. *But see* annotation to Kan v. Porter, 77 Cal. 257, 235 Pac. 561, 44 A.L.R. 168 (1925), as to the maxim *de minimis non curat lex.*

[28]Miss. Code Ann. (1942) § 3940 (x). Statute has been amended by Miss. Laws 1944, c. 180, to permit claim of $100 annually.

treasury of lost costs and declared, "A justice of the peace is not disqualified so long as he can look to the county for payment in event he acquits a defendant on trial in a criminal case."[29] This point seemed to be the crux of the matter of disqualification, but an enlargement thereon in a further discussion of this element of the situation by the court, *a fortiori,* suggests a possible application for the *Tumey* doctrine in Mississippi. This possible application is apparent from the language of the court in discussing the position of the appellant in the justice court:

> He was before the justice of the peace, presumably the docket was there, and it was a matter of a few minutes of time to ascertain the truth if the justice of the peace was to be rescued because of his interest to convict the defendant in order to secure his costs.[30]

It is apparent that a justice who has exhausted the amount allowable for lost costs in such cases might be said thereafter to have a direct, certain and immediate pecuniary interest. In spite of the statement of the prevailing opinion, that "in the light of our own holdings and our system of the administration of justice, we say that condition of affairs could not arise in Mississippi as is disclosed by the record in the *Tumey* case,"[31] it is evident that such a situation *may* occur to bring the facts in Mississippi cases within the purview of the *Tumey* doctrine. The *Tumey* case and the Ohio statutes in force at that time reveal that a sum in the amount of $500.00 was allowed annually for enforcement of the Prohibition Act, a sum which, though not directly earmarked for lost costs, could under their system be diverted to cover such items.[32]

In a separate opinion, Justice Anderson concurred on the sole ground that the appeal was from a trial *de novo* in the circuit court, which had supplied the appellant with due process. In positive disagreement with the basis of the principal opinion, founded on the saving factor of the $60.00 lost costs statutory allowance, he declared:

> Under the *Tumey* case, I can see no escape from the conclusion that the justices of the peace of this state, sitting for the trial of misdemeanors, are not judicial tribunals, they are not courts under the due process clause of the Fourteenth Amendment to the Federal Constitution. The pittance of sixty dollars

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[29]Hitt v. State, *supra* note 23, at 738.
[30]*Ibid.*
[31]*Id.* at 730.
[32]Ohio Gen. Code (1920) §§ 6212-37; 109 Ohio Laws, p. 9, § 17.

> a year allowed by our statute out of the county treasuries to justices of the peace for their lost costs, does not save them from interest in the result of such prosecutions. It seems to me that this is too apparent to require discussion.[33]

The fact that the defendant had obtained a trial *de novo* in the circuit court distinguished the *Hitt* case from the *Tumey* case in the opinion of Chief Justice Smith, who said:

> Assuming that the justice of the peace before whom this prosecution was begun was disqualified from trying the appellant, he cannot now complain thereat, for the reason that he will not, and cannot be called on to pay the fine, or suffer the imprisonment imposed on him by the justice of the peace. The fine and imprisonment that he will here be called on to pay and suffer were imposed by a court to which he appealed from that of the justice of the peace, presided over by a competent judge, and which determined his guilt or innocence uninfluenced by the judgment of the justice of the peace. Such was not the case in *Tumey v. State of Ohio*.[34]

A careful search has revealed but two further attempts to invoke directly the *Tumey* doctrine in Mississippi, in misdemeanor cases before justices of the peace, in both of which the court followed *Hitt v. State*.[35]

## Conclusions

The statute scheduling fees for justice courts in Mississippi, particularly in misdemeanor cases, standing alone and unqualified, seems clearly within the principle applied in the *Tumey* case. In Mississippi, however, an appeal as of right by the defendant from the decision of the justice is guaranteed.[36] That is the principal distinction between the situation in Mississippi, and that presented in the *Tumey* case, where trial was before a mayor, without a jury, and with no opportunity for a trial *de novo*.[37]

It is the opinion of this writer that the statute allowing these fees in misdemeanor cases, even if constitutional, is unwise and should be

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[33]Hitt v. State, *supra* note 23, at 735.
[34]*Id.* at 737.
[35]Foote v. State and Jones v. State, *supra* note 23.
[36]See note 5, *supra*.
[37]Sikes, *Judicial Administration in Mississippi*, 6 Miss. L.J. 127 (1936). *See* Williams v. Brannen, 116 W.Va. 1, 178 S.E. 67 (1935), where the right of appeal is not enough.

repealed. Judicial administration in Mississippi requires an extensive system of inferior courts[38] and a number of practical and efficient systems have been suggested and recommended which would serve our needs and at the same time destroy the fee system.

The most noteworthy of these recommendations combines simplification and economy in advocating a county court for each county, with the provision that terms of these courts be held regularly in each of the supervisor's districts. Under this system the justice of the peace courts would be abolished.[39] To effect this abolition outright would require a change in the constitution by amendment[40] but it could be effected indirectly by statute. At present a statute[41] is in effect in Mississippi which would require mere initiative on the part of the electorate on a county basis to establish county courts with concurrent jurisdiction with the justice courts. Such a court sitting regularly in each of the supervisor's districts would probably cause the justice courts to fall into disuse, and thus accomplish the desired change without the necessity of constitutional amendment.

Another suggested solution which resulted from a detailed study of a single county's justice court system was that the method of selection of justices of the peace be made appointive rather than elective. These appointive justices would be paid regular salaries, eliminating the fee system.[42] The *Institute for Government Research*[43] concurs in this recommendation. Under the plan advanced as a result of their survey the county court judge would make the appointments and have the power of removal. The survey concluded that no amount of reform in the other parts of the judicial system would remedy existent evils without a wise solution of the problems of such inferior courts. This conclusion seems irrefutable, for certainly "feet of clay" will not support a body of steel.

*Stewart C. Broome, Jr.*

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[38]Butts, *The Court System of Mississippi,* 3 Miss. L.J. 125 (1930).
[39]*Id.* at 125, note 111.
[40]Laws of Miss. 1926, c. 131.
[41]Sikes, *Judicial Administration in Mississippi,* 6 Miss. L.J. 127 (1936).
[42]*Id.* at 128, 129.
[43]*See* Report on a Survey of the Organization and Administration of State and County Government in Mississippi, Brookings Institution 821 (1932).

## Administrative Law—Findings of Administrative Body as Res Judicata

The state tax commissioner levied an additional sales tax against *V*, in 1942, as authorized by statute;[1] *V* appealed to the state tax commission, which approved the assessment. An unsuccessful appeal was prosecuted by certiorari in the circuit court, Mississippi Supreme Court,[2] and United States Supreme Court.[3] When execution was sued out to collect the tax, *V* sought unsuccessfully to enjoin the collection in chancery court, Mississippi Supreme Court,[4] and the United States Supreme Court.[5] The tax was paid and this suit instituted to recover the payment; a plea of res judicata was entered by the state tax commissioner.[6] Held: Plea of res judicata may not rest upon mere administrative action. *Viator v. Stone*, 33 So.2d 310 (Miss. 1948).[7]

This series of litigation, involving three separate attacks on the tax commission's findings and lasting from 1942 to the present, shows a need to limit the right to judicial review of findings of the state tax commission. One of the purposes of the statute is to secure the prompt payment of the tax.[8] Thus, inquiry should be made as to whether each step in the proceedings is permissible, whether the court has settled the real issue in the case, and if not what action may be taken to avoid this delay in finally settling the rights of the state and the taxpayer.

Each of the methods of attacking the commission's findings pursued by the taxpayer in this litigation can be justified under a reasonable interpretation of various statutes. When the tax commissioner takes stautory steps to assess the additional tax,[9] the taxpayer may petition the commission for a hearing and correction of the amount, and if his petition fails he may pay the tax and sue the tax collector in circuit court to recover the amount so paid.[10] Thus, there is a provision for a collateral attack on the finding and, though it has been held that the statute does not contemplate an appeal on the record as by certiorari,[11] there is nothing to negative the right of a taxpayer to sue out a writ of certiorari in the circuit court under Section 1207 of the Mississippi Code. This section allows certiorari to review judgments of all tribunals inferior to circuit court. Mere administrative orders cannot be removed for they are not judgments, but administrative orders which are of a judicial or quasi-judicial nature may be re-

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[1]Miss. Code Ann. (1942) § 10120.
[2]Viator v. State Tax Comm'n, 193 Miss. 266, 5 So.2d 487 (1942).
[3]Viator v. State Tax Comm'n, 316 U.S. 644 (1942).
[4]Viator v. Edwins, 195 Miss. 220, 14 So.2d 212 (1943).
[5]Viator v. Edwins, 321 U.S. 744 (1944).
[6]Viator v. Stone, 29 So.2d 274 (Miss. 1947), *sugg. of error overruled*, 29 So.2d 658 (Miss. 1947).
[7]The sixth appearance of this case in the Mississippi Supreme Court will probably occur when the case has been tried on the merits.
[8]Independent Linen Service Co. v. Stone, 192 Miss. 832, 6 So.2d 110 (1942).
[9]Miss. Code Ann. (1942) § 10120. Additional assessments for taxes may be made even though the taxpayer has kept adequate records. Rigby v. Stone, 194 Miss. 775, 11 So.2d 823 (1943).
[10]Miss. Code Ann. (1942) § 10122.
[11]Stone v. Kerr, 194 Miss. 646, 10 So.2d 845 (1942).

moved.[12] Only questions of law will be examined by the court to which a case has been removed by certiorari.[13]

One of the sales tax statutes[14] says that no injunction will lie to prevent payment of these taxes and that Section 1340 of the Code will not apply, but the Constitution of Mississippi[15] prescribes chancery jurisdiction and Code Section 1340 gives the chancery court jurisdiction to enjoin collection of taxes which are levied or attempted to be collected without authority of law. When faced with this disparity in the statutes, an attorney might reasonably conclude that the provision in the sales tax statute is unconstitutional, as limiting the jurisdicion of chancery, and so might decide to seek an injunction against collection of the tax. But it is submitted that the court was correct in upholding the provision which prohibits injunctions for the reason that under this statute[16] there is a clear, adequate and complete remedy at law, so there should be no injunctive relief.[17] When prior reviews of the findings by certiorari and injunctive proceedings have been had, the suit for recovery of the tax could be allowed only if it is held that the previous hearings were not res judicata.

That the plea of res judicata cannot rest upon mere administrative action is, in a broad sense, true.[18] However, on examining this statement more closely it will be found that the doctrine of res judicata can be applied to determinations of facts by administrative tribunals when they are exercising quasi-judicial functions, as distinguished from rule-making, purely administrative, or other non-judicial powers.[19] The following findings have been recognized as judicial or quasi-judicial findings: audit of claims against a county,[20] decision of a motor transportation commission,[21] and decision of a workmen's compensation board.[22]

From the above authorities it would seem that the real issue in this case was whether the state tax commission is exercising quasi-judicial functions so that its findings of fact are res judicata. The court avoided this issue in reviewing a finding of the public service commission in *Dixie Greyhound Lines, Inc. v. Mississippi*

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[12]Anderson v. Franklin County School Board, 164 Miss. 646, 146 So. 134 (1933); I.C. R. v. Miller, 141 Miss. 223, 106 So. 636 (1926); Forrest County v. Melton, 123 Miss. 615, 86 So. 369 (1920); Gulf & S. I. R. v. Adams, 85 Miss. 772, 38 So. 348 (1905). Certiorari does not lie to review freight rates, I.C. R. v. Miss. River Comm'n, 143 Miss. 805, 109 So. 868 (1926); or telephone rates, Cumberland T. & T. Co. v. State, 135 Miss. 185, 100 So. 378 (1924).

[13]*Re* Validation of Lincoln County Funding Bonds, 187 Miss. 392, 193 So. 26 (1940); Federal Credit Co. v. Rogers, 166 Miss. 559, 148 So. 353 (1933); Simpson v. Phillips, 164 Miss. 256, 141 So. 897 (1932); Federal Credit Co. v. Zepernick Grocery Co., 153 Miss. 489, 120 So. 173 (1929).

[14]Miss. Code Ann. (1942) § 10122.

[15]Miss. Const. § 159.

[16]Miss. Code Ann. (1942) § 10122.

[17]Stone v. Kerr, *supra* note 11.

[18]State v. Miller, 162 Miss. 149, 137 So. 737 (1931) (proceedings before a superintendent of education are administrative and his decisions are not res judicata); Pearson v. Williams, 202 U.S. 281 (1906) (board of inquiry under Immigration Act is not a court so its decisions are not res judicata to later court actions).

[19]Hart, Introduction to Administrative Law 355 (1940).

[20]Board of Police v. Grant, 9 Smedes & M. 77, 42 Am. Dec. 102 (Miss. 1847).

[21]Cardinal Bus Lines v. Consolidated Coach Corp., 254 Ky. 586, 72 S.W.2d 7 (1934).

[22]Happy Coal Co. v. Hartbarger, 251 Ky. 779, 65 S.W.2d 977 (1934).

*Public Service Commission*,[23] and in the instant case a decision was avoided by refusing to admit that any administrative finding may be res judicata. In determining the question it is necessary to consult the enabling statute of the tax commission. Section 10135 of the Mississippi Code gives the commissioner many of the powers of a court, such as power to examine books, summon witnesses and to require testimony or papers from any such witness. When the testimony is refused or the paper is not forthcoming, the commissioner can have the person called into circuit court to show why he did not comply with the summons or *subpoena duces tecum*. Another statute[24] imposes many of the procedural requisites of a court on the state tax commission when it conducts a hearing on the petition of the taxpayer; it requires the commission to consider the petition, grant a hearing, give notice to the petitioner of the time and place of the hearing, and issue an order, a copy of which must be supplied to the petitioner. From this cursory glance at the statutes it is seen that the taxpayer is guaranteed due process of law and that the finding of the commission will so bind the property of the petitioner that the finding should be at least that of a quasi-judicial body. It is submitted that this issue should have been decided by the court to prevent future uncertainty as to judicial review of findings of the state tax commission.

Alternatively, if the statutes as now constituted are not sufficiently clear to be the basis for saying the state tax commission is a quasi-judicial body whose findings are conclusive, then the decision in *State Corporation Commission v. Wichita Gas Company*[25] should be followed. In that case the Court held that decisions of state courts reviewing orders of commissions are res judicata and can be pleaded as a bar to subsequent suits.[26] Then, whether the state tax commission is a quasi-judicial body or not, the decision of the Mississippi Supreme Court on the taxpayer's writ of certiorari from the finding of the tax commission[27] would be res judicata.

A final ground for a judicial solution to the problem is found in the dissent of Chief Justice Smith in a previous decision in this case,[28] wherein he says that the taxpayer here had a choice of remedies and his election to seek judicial review by the certiorari route estops him from later bringing an action to recover the tax paid.[29]

The better method of resolving the dilemma would be for the legislature to amend the pertinent statutes in such manner that either:

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[23]190 Miss. 704, 713, 200 So. 579, 580 (1941).

[24]Miss. Code Ann. (1942) § 10122. *See* Kimbrough, *Mississippi Supreme Court Decisions on Administrative Law*, 17 Miss. L. J. 127, 142 (1945).

[25]290 U.S. 561 (1934). *Accord:* Betts v. R. R. Comm'n, 11 F. Supp. 591 (1933), *aff'd* 291 U.S. 652 (1934); St. Louis S.W. R. v. Missouri P. R., 289 U.S. 76 (1933); Napa Valley Electric Co. v. R. R. Comm'n, 251 U.S. 366 (1920).

[26]*See* Dissent of Griffith, J., Viator v. Stone, 29 So.2d 274, 278 (Miss. 1947); 2 Freeman, Judgments § 1826 (5th ed. 1925).

[27]Viator v. State Tax Comm'n, 193 Miss. 266, 5 So.2d 487 (1942).

[28]Viator v. Stone, 29 So.2d 274, 280 (Miss. 1947).

[29]*Accord:* Miller v. Phipps, 161 Miss. 564, 133 So. 128 (1931); Warriner v. Fant, 114 Miss. 74, 74 So. 822 (1917); Murphy v. Hutchinson, 93 Miss. 643, 48 So. 178, 21 L.R.A.(N.S.) 785 (1909); Watson v. Perkins, 88 Miss. 64, 40 So. 643 (1906).

(1) The state tax commission is definitely declared to be a quasi-judicial body which makes conclusive findings of fact,[30] and the right of certiorari from the commission's findings is barred,[31] as the right to enjoin the collection of the tax has been negatived; thus a suit in circuit court to recover the money paid would remain as the only available remedy; or
(2) The state tax commission is declared to be a quasi-judicial body, which makes conclusive findings of facts, and the right to bring a suit to recover the taxes paid is deleted[32] from the statute; thus the only means of judicial review would be by certiorari and the commission's findings of fact would be res judicata;[33] or
(3) An election of remedies is required by statute[34] and the taxpayer's filing his petition for writ of certiorari or his declaration in a suit to recover taxes paid, would evidence his election.

The second alternative above is thought to be the better procedure to assure the prompt payment of taxes and to assure the taxpayer a fair, but prompt, judicial review of his case. If the legislature fails to remedy this situation, the Supreme Court may find it necessary to reach the same result by judicial decision.

*Roland D. Marble*

## Bills and Notes—Release of Maker May Not Discharge Indorser

Defendant came to plaintiff bank to request a loan for *F*. A loan was made and a note, indorsed by defendant, was given the bank by *F*, secured by a mortgage on *F's* real estate. Following a default by *F*, defendant consented to the bank's releasing *F* by *F's* giving a quitclaim deed of the mortgaged property to the bank. The bank sold the property, credited the proceeds on the note, and sought to recover the balance due from the defendant. Held: The indorser's consent to the holder's release of the maker and his agreement to remain liable thereafter is a case not covered by the Negotiable Instruments Law, and rules of the law merchant shall govern.[1] *Howard National Bank & Trust Co. v. Newman,* 50 A.2d 896 (Vt. 1947).

A general principle of suretyship is that a release by a creditor of a principal debtor discharges the surety. It is said that by such release, the creditor intends to free the principal debtor not only from direct liability to himself but also from indirect liability to the surety, and if the surety is not discharged, a circuity of actions results. However, if the principal debtor is released and the creditor reserves his right against the surety, that is, in effect, a covenant not to sue the principal debtor, and in such a case, the surety remains bound.[2] This principle is codified by the N. I. L., Section 120, Subsection 5: "A person secondarily liable

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[30]By amending Miss. Code Ann. (1942) §§ 10122, 10135.
[31]By amending Miss. Code Ann. (1942) § 10122.
[32]*Ibid.*
[33]Cases cited notes 13 and 25 *supra.*
[34]Miss. Code Ann. (1942) § 10122.
[1]Section 196 of the N. I. L. provides: "In any case not provided for in this act the rules of the law merchant shall govern."
[2]Arant on Suretyship 179; Bigelow, Law of Bills, Notes, and Checks § 589, *et seq.* (3rd ed.).

on the instrument is discharged by a release of the principal debtor, unless the holder's right of recourse against the party secondarily liable is expressly reserved."

It will be noted that this section makes no provision as to the indorser's consent to the holder's releasing the maker. Prior to the general adoption of the N. I. L., the undisputed common law rule was that consent by the person secondarily liable prevented a discharge of the principal debtor from operating to release the person secondarily liable.[3] The indorser or other surety could not complain of a release to which he had assented.[4]

The courts, in construing this section of the law, have frequently interpreted it as a complete codification of the law of discharge of surety parties, and have predicated this view on the maxim that the inclusion of this and the other subsections therein is an exclusion of all others. Another line of reasoning on which this view of the section as a complete codification of this particular problem has been based is that in order to achieve uniformity, the act must be construed as far as possible without reference to rules of law not expressed therein.[5]

It is submitted that the previous interpretations of this section as a complete codification of the law of suretyship regarding parties to negotiable instruments is unsound. That the act is not a complete code in this respect is certain. As early as 1913 it was contended by Brannan and Ames that Section 120 should be amended because the N. I. L. could not and does not attempt to state fully all of the cases in which the law of suretyship may be changed as to the liability of parties to bills and notes.[6] In this contention, they have not been alone, for many others have endeavored to point out that Section 120 can be construed without upsetting the established doctrines of suretyship.

Illustrations of the inevitable result that follows when this section is construed as a complete codification of the law in this respect and the consequent variance with the established rules of suretyship may be found in the decisions of courts of last resort in many states.[7] In *National Bank of La Crosse v. Funke*[8] the court held that Section 120 (5) modified the common law rule that consent by a surety to release of the principal debtor leaves the surety bound, and concluded that the person secondarily liable was not bound although he consented to the discharge of the principal debtor. In another case[9] it was held under this same provision of the N. I. L. that an indorser, who expressly consented to the principal debtor's discharge by an indorsement on the note signed by himself, was discharged

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[3]Frost v. Harbert, 20 Idaho 336, 118 Pac. 1095 (1911); DeColyar, Law of Guaranties 422 (3rd ed.).

[4]Bigelow, *supra* note 2, § 604 a.

[5]Andrews and Lenoir, *An Interpretation of the N. I. L.*, 8 Miss. L. J. 165, 168 (1936); Note, 38 Harv. L. Rev. 954, 956 (1925).

[6]Brannon, *Some Necessary Amendments of the N. I. L.*, 26 Harv. L. Rev. 588, 594 (1913).

[7]Newman v. Ryan, 181 So. 216 (La. App. 1938); Phoenix Nat. Bank of N. Y. v. Hanlon, 183 Mo. App. 243, 166 S.W. 830 (1914); Cellars v. Mecham, 90 Ore. 186, 89 Pac. 426 (1907); National Bank of La Crosse v. Funke, 215 Wis. 541, 255 NW 147 (1934); Dunnington v. Bank of Crewe, 144 Va. 36, 131 SE 221 (1926). *But see* Arlington Nat. Bank v. Bennett et al., 214 Mass. 352, 101 NE 982 (1913).

[8]215 Wis. 541, 255 NW 147 (1934).

[9]Phoenix Nat. Bank of N. Y. v. Hanlon, *supra* note 8.

from liability because the right of recourse was not "expressly reserved."[10] That these decisions are at variance with the established principles of suretyship is obvious.

It is believed that the Supreme Court of Mississippi has not passed on this precise question since the adoption of the N. I. L. However, by way of dictum in the case of *Hederman v. Cox*[11] it was said that the rules respecting the relationship of principal and surety in the matter of accommodation paper were not abrogated in Mississippi by the adoption of the N. I. L.

In the instant case, the court logically held that the indorser's consent and agreement to the creditor's releasing the principal debtor is a case omitted from Section 120 (5) and thus Section 196, which provides that in any case not provided for in the act the rules of law and equity of the law merchant shall govern, is rendered applicable. It seems this decision is a sound one. A close examination of this section indicates that this interpretation is justified and prevents a conflict with the accepted rules of suretyship. In the final analysis, the effect of the decision is that where a party consents to the doing of an act which would not have been done but for his assent thereto, the person so assenting will not be permitted to make the doing of it a matter of personal advantage.

*William O. Luckett*

## Conflict of Laws—Non-Resident Motorist Service Act—Validity of Service of Process on Foreign Executors and Administrators

In an automobile accident occurring in Iowa, a resident of Iowa was injured by an automobile driven by a resident of South Dakota and owned by another resident of South Dakota. Subsequent to the accident the owner of the automobile died intestate, owning no property in Iowa, and letters of administration of his estate were taken out in South Dakota. The resident of Iowa then brought suit in Iowa. Service of process was had upon the defendant driver and the defendant administratrix of the estate of the deceased owner under the Iowa Non-Resident Motorist Service Act.[1] Held: The case was dismissed for want of jurisdiction over the defendant administratrix; that part of the Iowa statute[2] providing for service of

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[10]In the instant case the court held that the consent of the indorser, express or implied, to the release of the principal debtor is not equivalent to an express reservation of the "right of recourse."

[11]188 Miss. 21, 37, 193 So. 19, 23 (1940).

[1]1 Code of Iowa (1946) § 321.498: "The use and operation of a motor vehicle in this state on the public highways thereof by a person who is a nonresident of this state shall be deemed: (1) An agreement by him that he shall be subject to the jurisdiction of the district court of this state over all civil actions and proceedings against him for damages to person or property growing or arising out of such use and operation, and (2) An appointment by such nonresident of the commissioner of public safety department of this state as his lawful attorney upon whom may be served all original notices of suit pertaining to such actions and proceedings, and (3) An agreement by such nonresident that any original notice of suit so served shall be of the same legal force and validity as if personally served on him in this state."

[2]1 Code of Iowa (1946) § 321.499:" 'Person' defined. The term 'person,' as used in section 321.498 shall mean: . . . The executor or administrator of the estate of the owner or operator of the motor vehicle."

process on a foreign executor or administrator was invalid. *Knoop v. Anderson,* 71 F.Supp. 832 (N.D. Iowa 1947).

The first non-resident motorist service act was enacted in 1908 in New Jersey,[3] and its validity was upheld by the Supreme Court of the United States in an action against a living non-resident defendant.[4] In 1923 a statute was enacted in Massachusetts providing that the use of the highways of that state by a non-resident should be deemed equivalent to the appointment of the local registrar as attorney for the service of process in actions growing out of the operation of the automobile in that state.[5] The Supreme Court of the United States also upheld this statute in an action against a living non-resident defendant.[6] Following this lead all of the forty-eight states and the District of Columbia enacted statutes similar to that of Massachusetts.[7] In their original form these acts made no specific provision in regard to the service of process upon an executor or administrator in case the non-resident motorist should die prior to, or pending, an action. A number of suits, however, were brought, or revived, against foreign executors and administrators of the estates of deceased non-resident motorists. The courts were unanimous in holding, under these original acts, that service of process upon a foreign executor or administrator was invalid. The reasons assigned for these holdings were: (1) the statutes were to be strictly construed, and they made no specific provision for service of process on foreign executors and administrators;[8] (2) death revoked the agency of the particular state official who was to act as attorney for the service of process;[9] or (3) service of process upon a foreign executor or administrator was invalid in any sense.[10] As a result, apparently, of these decisions invalidating service of process upon foreign executors and administrators, the legislatures of at least six states amended their non-resident motorist service acts so as to authorize service of process upon a foreign executor or administrator.[11] The first reported case to be decided under the amended non-resident service act was rendered by the Supreme Court of Arkansas,[12] which court held that service of process upon a foreign executor was legal and valid.[13]

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[3]N.J. P.L. (1908) 613.

[4]Kane v. State of New Jersey, 242 U.S. 160 (1916).

[5]Mass. Stat. (1923), c. 431, § 2.

[6]Hess v. Pawloski, 274 U.S. 352 (1927).

[7]The statutes are collected in Knoop v. Anderson, 71 F.Supp. 832 (N.D. Iowa 1947) at p. 836.

[8]Riggs v. Schneider, 279 Ky. 361, 130 S.W.2d 816 (1939); Downing v. Schwenck, 138 Neb. 395, 293 N.W. 278 (1940); Vecchione v. Palmer, 249 App.Div. 661, 291 N.Y.S. 537 (1936); Balter v. Webner, 175 Misc. 184, 23 N.Y.S.2d 918 (1940); Young v. Potter Title and Trust Co., 114 N.J.L. 561, 178 A. 177 (1935); Donnelly v. Carpenter, 55 Ohio App. 463, 9 N.E.2d 888 (1936); State *ex rel.* Ledin v. Davidson, 216 Wis. 216, 256 N.W. 718, 96 A.L.R. 589 (1934).

[9]Buttson v. Arnold, 4 F.R.D. 492 (E.D. Pa. 1945); Brogan v. Macklin, 126 Conn. 92, 9 A.2d 499 (1939); Lepre v. Real Estate-Land Title Trust Co., 11 N.J.Misc. 887, 168 A. 858 (1933); Young v. Potter Title and Trust Co., *supra* note 8; Dowling v. Winters, 208 N.C. 521, 181 S.E. 751 (1935); Donnelly v. Carpenter, *supra* note 8; Harris v. Owen, 142 Ohio St. 379, 52 N.E.2d 522 (1943).

[10]Riggs v. Schneider, *supra* note 8; Vecchione v. Palmer, *supra* note 8; Balter v. Webner, *supra* note 8.

[11]Arkansas, Iowa, Maryland, Michigan, New York, and Wisconsin. The statutes are collected in Knoop v. Anderson, 71 F.Supp. 832 (N.D. Iowa 1947) at p. 836.

[12]Oviatt v. Garretson, 205 Ark. 792, 171 S.W.2d 287 (1943).

[13]*Id.* The court said, 171 S.W.2d at 290: ". . . an administrator or executor would not be relieved under the doctrine that the power of agency ends with the death of the principal. The question goes to the power of the sovereign to pass such a law. We hold it has such power and has properly exercised it."

In *Knoop v. Anderson*[14] the federal district court in Iowa reached the opposite conclusion.

The general rule undoubtedly is that an action will not lie against a foreign executor or administrator.[15] But for the Arkansas case,[16] the exceptions to the general rule are easily distinguishable from the principal case.[17] The reasons behind the general rule are not hard to see. An administrator is the creature of the state under the laws of which he is empowered to act, and he is amenable under those laws only; it is desirable that all claims against an estate be handled at one place in order that one claim will not be unfairly preferred over another. The Supreme Court of the United States has held that the allowance of a suit against a foreign administrator is a matter of mere comity among the states,[18] and procedural difficulties are thus presented as to the manner in which these judgments are to be satisfied since any state may decline to honor such a judgment of a sister state.[19]

It must be observed, however, that the public policy which fostered the enactment of a non-resident motorist service statute in every state in the union is just as strong in the case of a claim for damages against a deceased motorist as it is in a case involving a surviving motorist. In fact, it would seem that the more serious the accident, the more apt is an administrator or executor to be involved. No logical reason exists why a judgment rendered in state *A* against an administrator appointed in state *B* cannot be satisfied out of the proceeds of the estate in state *B*. It is to be hoped that the procedural difficulties impeding the desired result may be eradicated by legislative and judicial recognition of the public policy calling for an allowance of such suits in these non-resident motorist service cases.

*John D. Guyton*

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[14]71 F.Supp. 832 (N.D. Iowa 1947).

[15]RESTATEMENT, CONFLICT OF LAWS § 512 (1934); 3 BEALE, CONFLICT OF LAWS 1552, § 512.1 (1935).

[16]Oviatt v. Garretson, *supra* note 12.

[17]*E.g.*, Cutrer v. State of Tennessee *ex rel.* Leggett, 98 Miss. 841, 54 So. 434, 35 L.R.A.(N.S.) 333 (1911) (the foreign executor had wrongfully converted proceeds of the estate to his individual use); Gray v. Camas, 304 Pa. 74, 155 A. 104 (1935) (the executrix had taken out ancillary letters testamentary); Decker v. Patton, 20 Ill. App. 210 (1886) (the executor entered appearance); Newark Savings Institution v. Jones, 35 N.J.Eq. 406 (1882) (suit for specific performance wherein executors entered appearances); Sylvania Industrial Corporation v. Lilienfeld's Estate, 132 F.2d 887 (C.C.A. 4th., 1943) (estate property had a situs in the state); Dewey v. Barnhouse, 75 Kan. 214, 88 P. 877 (1907) (suit to determine ownership to intangibles); *In re* Paine's Estate, 128 Fla. 151, 174 So. 430 (1937), wherein the court said: "Practically all these exceptions to the general rule have been suits in equity involving peculiar circumstances."

[18]Vaughn v. Northup, 15 Pet. 1 (U.S. 1841).

[19]Brown v. Fletcher's Estate, 210 U.S. 82 (1907).

## Constitutional Law—Equal Protection of the Law—Exclusion of Negroes from Juries

Defendant, a negro, was indicted by an all-white grand jury and charged with the murder of a white man. Defendant filed a motion to quash the indictment alleging that there were negroes in the county qualified for jury service, but due to a systematic and intentional discrimination against the negro race no negro had served on the grand or petit criminal court juries of that county for over 30 years. The trial judge overruled the motion to quash and a white jury selected from a special venire convicted defendant. On appeal* the Mississippi Supreme Court affirming the decision of the trial court said the accused had not proved illegal discrimination. The court refused to look behind the year immediately preceding the trial to find discrimination. After granting certiorari the United States Supreme Court reexamined the evidence and reversed the decision. Held: When defendant showed absence of negroes from juries for 30 years, the burden of proof was on the state to justify such exclusion. *Patton v. Mississippi,* 68 Sup. Ct. 184, 92 L. Ed. 164 (1947).

Section 1 of the 14th Amendment to the United States Constitution[1] and the statute enacted by Congress in 1875[2] supplementing that Amendment are the foundation on which all decisions upholding the right of negroes to serve on juries rest. On this foundation the well settled doctrine has developed that there is a denial of equal protection of the laws whenever a state, in the selection of either grand or petit jurors, discriminates against negroes solely because of their race or color.[3] But this does not mean that a defendant, as a matter of right, may demand that a representative of his race be placed on the jury.[4] His only right is that there must be no discrimination in the selection of the jurors.[5] Thus a mixed jury is not essential to equal protection of the laws.

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*29 So.2d 96 (Miss. 1947).

[1]"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; . . . nor deny to any person within its jurisdiction the equal protection of the laws."

[2]18 Stat. 336 (1875), 8 U.S.C. § 44 (1940). "No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State, on account of race, color, or previous condition of servitude; and any officer or other person charged with any duty in the selection or summoning of jurors who shall exclude or fail to summon any citizen for the cause aforesaid shall, on conviction thereof, be deemed guilty of a misdemeanor . . ."

[3]Hill v. Texas, 316 U.S. 400 (1941); Smith v. Texas, 311 U.S. 128 (1940); Pierre v. Louisiana, 306 U.S. 354 (1938); Hale v. Kentucky, 313 U.S. 613 (1937); Norris v. Alabama, 294 U.S. 587 (1935); Carter v. Texas, 177 U.S. 442 (1899); Neal v. Delaware, 103 U.S. 370 (1880); *Ex parte* Virginia, 100 U.S. 339 (1880); Virginia v. Rives, 100 U.S. 313 (1880); Strauder v. West Virginia, 100 U.S. 303 (1880).

[4]*Re* Shibuya Jugiro, 140 U.S. 291 (1891); Neal v. Delaware, *supra* note 3; Virginia v. Rives, *supra* note 3; Sanchey v. State, 181 S.W.2d 87 (Tex. Crim.App. 1944).

[5]It is generally held that the objection of discrimination in the selection of a jury is available only to members of the race or class discriminated against. Griffin v. State, 183 Ga. 775, 190 S.E. 2 (1937) (exclusion of women from jury); State v. James, 96 N.J.Law 132. 114 Atl. 553 (1921); McKinney v. State, 3 Wyo. 719, 30 Pac. 293, 16 L.R.A. 710 (1892).

When a negro defendant alleges discrimination against his race in the selection of the jury, the burden of proving this discrimination rests on him.[6] The two main elements to be shown by the defendant are: (1) the absence of negroes from the jury over a long period of time, and (2) that there were negroes qualified to serve on the jury in the particular locality.[7] But if, as in the instant case, the defendant can produce sufficient evidence to make out a prima facie case of discrimination, the United States Supreme Court holds that the burden of proof is then upon the state, and failure of the state to rebut the presumption warrants a reversal.[8]

Whether there has been systematic racial discrimination by administrative officials in the selection of jurors is necessarily a question of fact. The Court has held whether the question is one of fact or law is immaterial, and in either case it is the duty and province of the Court to inquire not merely whether the right was denied in express terms but also whether it was denied in substance and effect.[9] Thus the fact that the state statute setting up the procedure to be used in selecting jurors is constitutional on its face does not prohibit the Court from looking into the manner in which the statute was administered.[10] There is no constitutional limitation which precludes officers charged with the duty of selecting jurors from exercising sound discretion in selecting persons who in their judgment are competent to serve as jurors.[11] Nor is a state statute unconstitutional because it is possible that the discretionary power so granted to officials who select the jurors might be used by them to discriminate against the colored race.[12] But the Court has held that arbitrary determination by jury officials that no negroes meet the intelligence or character requirements is a violation of the 14th Amendment as if the statute itself were invalid.[13]

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[6]Tarrance v. Florida, 188 U.S. 519 (1903); Carter v. Texas, 177 U.S. 442 (1899); Smith v. Mississippi, 162 U.S. 592 (1896); Herndon v. State, 178 Ga. 832, 174 S.E. 597 (1934).

[7]Note, *Exclusion of Negroes from Jury—Sufficiency of Evidence to Establish Discrimination*, 30 J. CRIM. L. 264 (1939).

[8]This idea first appeared in Neal v. Delaware, 103 U.S. 370 (180), but until Norris v. Alabama, 294 U.S. 587 (1935), was seldom used or quoted. Since the latter case, however, the Supreme Court has restated the doctrine on many occasions. *See* Hill v. Texas, 316 U.S. 400 (1941); Pierre v. Louisiana, 306 U.S. 354 (1938); Hale v. Kentucky, 303 U.S. 613 (1937).

[9]Chamber v. Florida, 309 U.S. 227 (1939); Pierre v. Louisiana, *supra* note 8.

[10]Akins v. Texas, 325 U.S. 398 (1944); Smith v. Mississippi, 162 U.S. 592 (1896).

[11]Smith v. State, 4 Okla. Crim. Rep. 328, 111 Pac. 960 (1910).

The competency of the southern negro to serve on juries is a problem not often considered by the courts. There must necessarily be some personal judgment involved and the safer procedure would be to have the selecting official make a record of his reasons for selecting or rejecting each prospective juror.

[12]Williams v. Mississippi, 170 U.S. 213 (1898); Murray v. Louisiana, 163 U.S. 101 (1896).

[13]Hill v. Texas, 316 U.S. 400 (1941); Smith v. Texas, 311 U.S. 128 (1940); Norris v. Alabama, 294 U.S. 587 (1935); Neal v. Delaware, 103 U.S. 370 (1880).

It is well settled that the inhibition of the 14th Amendment is not confined to state action as expressed by its legislative department, but applies also to conduct of such responsible ministerial agencies of the state as accomplish what is denounced by the amendment. Carter v. Texas, 177 U.S. 442 (1899); *Ex parte* Virginia, 100 U.S. 339 (1880).

The doctrine of the instant case is not new but until recently it was seldom applied.[14] In fact the United States Supreme Court ordered new trials in only two negro exclusion cases between 1881 and 1934.[15] The doctrine was stated with vigor in *Norris v. Alabama,*[16] and has been applied many times since.[17] The recent use of this old doctrine, which puts the burden of proof on the state when the defendant has shown that negroes have not served on the jury in a long time, is but another demonstration of the extent to which the Supreme Court has gone for the protection of civil rights in recent years.[18]

*Dudley Buford*

## Criminal Law—Degree of Punishment Which May Be Inflicted by Person in Loco Parentis

Defendant prosecuted by state for inflicting excessive punishment on seven year old girl placed in his care by child's mother. Evidence disclosed stripes and cuts covering entire back and legs, bruises on arms and head. Jury convicted defendant, court instructing jury in substance that a person standing *in loco parentis* has a right to punish a child within the bounds of moderation and reason, so long as he does it for the welfare of the child; but that if he exceeds due moderation, he becomes criminally liable. Assignment of error by defendant contended that the test of criminal liability was whether permanent injury was inflicted, or whether accused acted with malice. Affirmed. *Carpenter v. Commonwealth,* 44 S.E.2d 419 (Va. 1947).

The common law foundation of parental authority to discipline children arises out of the duty to maintain and educate the child; the law has given parents such authority, and, in the support of that authority, a right to the exercise of such discipline as may be required for the discharge of their sacred trust.[1] It is generally recognized that one standing *in loco parentis* has the same right as the parent to punish a child.[2]

The decided preponderance of authority is that a parent in punishing his child must act in good faith with parental affection, must not exceed the bounds of mod-

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[14]*See* note 8 *supra.*

[15]Rogers v. Alabama, 192 U.S. 226 (1903); Carter v. Texas, *supra* note 13.

[16]294 U.S. 587 (1935).

[17]*See* note 3 *supra.*

[18]The United States Supreme Court is always zealous to preserve the rights of an accused under the Federal Constitution and seems inclined in doubtful cases to hold in favor of the defendant's allegation; while the state courts, as a rule, being more sensitive to local conditions and more sympathetic with the practical difficulties faced by officers within the state in selecting impartial and competent jurors, seem inclined to hold against the defendant. *Compare* Norris v. Alabama, 294 U.S. 587 (1934), and Smith v. Texas, 311 U.S. 128 (1940), *with* Green v. State, 73 Ala. 26 (1882) and Haynes v. State, 71 Fla. 585, 72 So. 180 (1916).

[1]2 Kent, Comm. 203.

[2]Fortinberry v. Holmes, 89 Miss. 373, 42 So. 799 (1907); Donnelley v. Territory, 5 Ariz. 291, 52 Pac. 368 (1898); Marshall v. Reams, 32 Fla. 499, 14 So. 95, 37 Am.St.Rep. 118 (1893); Gorman v. State, 42 Tex. 221, 36 Am.Rep. 254 (1875). Teachers *in loco parentis,* Cameron v. State, 24 Ala.App. 438, 136 So. 418 (1931), and People v. Mummert, 183 Misc.R. 243, 50 N.Y.S.2d 699 (1945). Right of control ceases when ward goes out into world to start supporting herself. Eitel v. State, 78 Tex.Crim.Rep. 552, 182 S.W. 318 (1916).

eration, and must not be cruel or merciless, and that any act of punishment in excess of such limits is unlawful.[3] Whether in any case punishment exceeded the bounds referred to is a question of fact for the jury, and they may determine it from the injuries inflicted.[4] The jury should consider the age, size and conduct of the child, the nature of his misconduct, the nature of the instrument used for punishment, and the kind of marks or wounds inflicted on the body of the child.[5]

Under the majority rule the mere fact that it is due to an error of judgment on the part of the parent does not relieve the parent from criminal liability for such excessive punishment.[6] It is not the infliction of punishment, but the excess, which constitutes the offense, and what this excess shall be is not a conclusion of law, but a question of fact for the determination of the jury.[7]

The minority view is that in order to hold the parent criminally responsible, a permanent injury must have been inflicted, or the punishment must have proceeded from malice and not in the exercise of corrective authority.[8] The parent is not criminally liable in all cases merely because, in the opinion of the jury, the punishment inflicted is immoderate or excessive. More than this is requisite to fasten criminality upon him. He must have inflicted on the child immoderate chastisement, and he must have done so *malo animo;* or else he must have inflicted some permanent injury.[9] The parent is the sole judge of the necessity for the exercise of disciplinary right. So long as he acts in good faith, honestly thinking that what he does is for the benefit of the child, he is within his prerogative, and the law will not interfere. Where the punishment inflicted is so excessive and cruel as to show, beyond a reasonable doubt, that the parent was not acting in good faith for the benefit of his child, but to satisfy his own evil passion, he is no longer a judge of the house, but a malefactor, unlawfully assaulting a helpless person.[10]

Mississippi has a statute declaring that the killing of a child by accident or misfortune in lawfully administering correction is an excusable homicide.[11] Mississippi cases on this same general question hold that a person *in loco parentis* is not liable in damages to the child for chastisement inflicted,[12] and that a parent may not torture and kill a child under guise of parental authority.[13] The latter case seemed

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[3]Powell v. State, 67 Miss. 119, 6 So. 646 (1889); Hornbeck v. State, 16 Ind.App. 484, 45 N.E. 620 (1896); State v. Washington, 104 La. 443, 29 So. 55, 81 Am.St.Rep. 141 (1900); People v. Green, 155 Mich. 524, 119 N.W. 1087, 21 L.R.A.(N.S.) 216 (1909); Mohr v. State, 19 Ohio C.C.(N.S.) 43 (1914); Walden v. State, 89 Tex.Crim.Rep. 464, 232 S.W. 523 (1921); State v. McDonie, 89 W.Va. 185, 109 S.E. 710 (1921); Steber v. Norris, 188 Wis. 366, 206 N.W. 173, 43 A.L.R. 507 (1925); State v. Spiegel, 39 Wyo. 309, 270 Pac. 1064, 64 A.L.R. 289 (1928).

[4]*Ibid.*

[5]Dean v. State, 89 Ala. 46, 8 So. 38 (1889); State v. Washington, *supra* note 3; Comm. v. Blaker, 1 Brewst. 311 (Pa. 1867); Stanfield v. State, 43 Tex. 167 (1875).

[6]Mohr v. State, *supra* note 3.

[7]Johnson v. State, 2 Humph. 283, 36 Am.Dec. 322 (Tenn. 1840).

[8]Cameron v. State, *supra* note 2; Roberson v. State, 22 Ala.App. 413, 116 So. 317 (1928); Dean v. State, *supra* note 5; People v. Green, *supra* note 3; State v. Alford, 68 N.C. 322 (1873); State v. Jones, 95 N.C. 588, 59 Am.Rep. 282 (1886).

[9]Haydon v. State, 15 Ala.App. 61, 72 So. 586 (1916); Dean v. State, *supra* note 5; State v. Koonse, 123 Mo.App. 655, 101 S.W. 139 (1907); Johnson v. State, *supra* note 7.

[10]People v. Green, *supra* note 3; State v Koonse, *supra* note 9.

[11]Miss. Code Ann. (1942) § 2219.

[12]Fortinberry v. Holmes, *supra* note 2.

[13]Powell v. State, *supra* note 3.

to merge the majority and minority rules, decreeing criminal liability for "intentional infliction of immoderate injuries."

The two rules of law, distinguished in the one case by the measure of correction, and in the other by the intent of the parent or permanent injury, remain academically distinct, but through application to the facts, they reach similar results. In cases decided on moderation of punishment inflicted, the question of determining moderation is left to the jury. In cases decided on intent of the parent or infliction of permanent injury, the jury is instructed that the necessary malice or criminal intent may be inferred from excessive punishment.[14] Therefore, regardless of the view followed, the ultimate decision rests upon the degree of punishment administered. There have been no properly presented cases[15] discovered holding that cruel or unusual punishment was justified merely because the parent was acting in good faith, or because no permanent injury was inflicted.

However, the line of distinction depends entirely upon the jury finding inferred malice from the degree of punishment, since a leading case under the majority rule holds that a parent is not criminally liable in all cases merely because the jury believes the punishment inflicted is immoderate or excessive; legal malice must be inferred from the excessive punishment to hold the parent criminally liable.[16]

*Clifton Maxwell*

## Evidence—Reformation of Instruments—Weight and Sufficience of the Evidence

Plaintiffs negotiated an oil lease from defendants who owned a farm in Mississippi. The conveyance provided for oil and mineral rights to an undivided $\frac{1}{64}$th interest in the land so conveyed. Subsequently, plaintiffs claimed to have discovered that the conveyance by mistake did not correspond to the agreement made between the parties, in that the interest which was intended to be conveyed was an undivided $\frac{1}{8}$th interest. After unsuccessful negotiation with defendants, plaintiffs filed a bill for reformation. The chancellor entered a decree reforming the conveyance so as to provide for an undivided $\frac{1}{8}$th interest. Defendants appealed. Held: Reversed. Reformation of instrument must be sustained by proof beyond a reasonable doubt. *Frierson et al. v. Sheppard et al.*, 29 So.2d 726 (Miss. 1947).

In civil cases the extreme caution and the unusual positiveness of persuasion required in criminal cases do not obtain. The quality of persuasion in criminal cases is evidence beyond a reasonable doubt, while in civil cases the phrase is that there must be a preponderance of the evidence. A stricter standard, however, is commonly applied in cases involving fraud, undue influence, mutual mistake sufficient to justify reformation of an instrument, and the like, where the quality of persuasion is defined in some such term as "clear and convincing proof."[1]

An examination of the cases reveals that the standards which have been applied by the Mississippi Supreme Court in the reformation of written instruments

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[14]People v. Green, *supra* note 3; State v. Koonse, *supra* note 9; State v. McDonie, *supra* note 3.

[15]Walden v. State, *supra* note 3. Evidence of intense cruelty was inadmissible due to a mistake of the date in the indictment.

[16]Haydon v. State, *supra* note 9.

[1]See Note, 26 A.L.R. 497 (1923); 9 Wigmore, Evidence § 2498 (3d ed. 1940).

are varied. One of the earliest Mississippi cases[2] held that the proof should be *clear and beyond a doubt,* while a later case[3] held that the evidence should be *clear and satisfactory.* The more recent cases, however, have applied the standard laid down in the instant case.[4]

It is submitted that the quality of persuasion *beyond a reasonable doubt* as applied in criminal cases is ill adapted to civil cases, principally because the standard is a fiction invented for the criminal law and therefore the reason for the rule does not extend to civil cases.[5] Sound reasons can be readily perceived why courts should exercise caution in reforming written instruments, but no substantial reason is apparent why criminal rules should be utilized in accomplishing the result. The most cogent reason assigned why criminal rules should not extend to civil cases is that it enables a wrongdoer to avoid civil liability under cover of the rules of criminal prosecution, the object of which is punishment.[6]

Perhaps the Court, in the instant case, in applying the rule *beyond a reasonable doubt* did so with the idea that the term was synonymous with such a phrase as clear, strong, and cogent proof. Courts in other jurisdictions have frequently used the terms interchangeably.[7]

It appears, therefore, that until courts see fit to discard these illusory concepts,[8] justice will best be served by confining these criminal and civil rules to their proper sphere in order that the mischief already pointed out shall be eliminated.

*William S. Turner*

## Marriage—Annulment for Non-age—Legitimacy of Child Born Two Months After Ceremony But Before Decree of Annulment

Complainant was under seventeen years of age when he married cross-complainant in Alabama. They did not cohabit after the ceremony, but two months thereafter respondent, the acknowledged daughter of both, was born. Four months later complainant sued for annulment on the ground of non-age under the Ala-

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[2]Harrington *et al.* v. Harrington *et al.,* 2 How. 701 (Miss. 1838).

[3]Norton v. Coley, 45 Miss. 125 (1871).

[4]Rogers v. Clayton, 149 Miss. 47, 115 So. 106 (1927); Watson *et al.* v. Owen, 142 Miss. 676, 107 So. 865 (1926).

[5]"When these rules began to take form and consistency, the penal code of England was a fearfully bloody code. Death, without benefit of clergy, was denounced against a multitude of misdoings which would now be considered, if offenses at all, offenses of a comparatively trivial character." Note, *Some Rules of Evidence,* 10 Am. L. Rev. 651 (1876).

[6]Cooper v. Spring Valley W. Co., 16 Cal. App. 17, 116 Pac. 298 (1911); Kane v. Hibernia Ins. Co., 39 N.J. Law 697, 23 Am. Rep. 239 (1877).

[7]Fish v. Poorman, 85 Kan. 237, 116 Pac. 898 (1911); Winston v. Burnell, 44 Kan. 369, 24 Pac. 478, 21 Am. St. Rep. 289 (1890); Reiss v. Wintersmith, 241 Ky. 470, 44 S.W.2d 609 (1932); Getts *et al.* v. Olsen *et al.,* 186 Wis. 70, 202 N.W. 160 (1925).

[8]"The truth is that no one has yet invented or discovered a mode of measurement for the intensity of human belief. . . . If this truth be appreciated, courts will cease to treat any particular form of words as necessary or decisive in the law for that purpose; for the law cannot expect to do what logic and psychology have not yet done." 9 Wigmore, Evidence § 2497 (3d ed. 1940).

bama statute,[1] naming wife and daughter as respondents. Wife filed a cross-complaint for divorce on the ground of abandonment. Daughter's guardian defended to prevent her bastardization in the event of annulment. HELD: Marriage annulled effective only from the date of the decree. Since the marriage was voidable rather than void *ab initio,* the decree does not bastardize the child born in lawful wedlock prior to the decree. *Taylor v. Taylor,* 31 So.2d 579 (Ala. 1947).

Under the old English ecclesiastical law marriages could be attacked as either void because of civil impediments existing at the time of the ceremony, or as voidable because of canonical impediments existing at that time.[2] Voidable marriages could be attacked only in direct proceedings during the lives of the parties; but void marriages could be attacked at any time, either directly or collaterally.[3] A decree of divorce *a vinculo matrimonii* issued for either cause nullified the marriage from its inception, relating back to bastardize all issue, even though born or conceived prior to the decree.[4] This was the origin of the doctrines of annulment in our country, where, in the absence of ecclesiastical courts, equity courts assumed jurisdiction over annulment suits as part of their common law[5] powers.[6]

Most of the states have modified the harsh common law rule by statute. The most common method is the express preservation by statute of the legitimacy of all issue born or conceived prior to the date of the decree annulling voidable marriages, and in some states, both voidable and void marriages. A second method is the statutory provision that if children have been born the decree takes effect only from the date of its issuance.[7] It would seem that the latter statutes have eradicated a basic distinction between annulment and divorce, and at least one court has emasculated such a statute.[8] Alabama has a statute[9] which provides that the issue of an incestuous marriage is not deemed illegitimate when born prior to the annulment of the marriage; but there is no such statute with regard to marriage annulled for non-age.

Under Alabama decisions the origin of causes for annulment as either civil or canonical is not a reliable indication of whether they are void or voidable. In that state marriages which are bigamous,[10] incestuous,[11] miscegenous,[12] or in which one of the parties was insane at the time of the ceremony,[13] are void *ab*

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[1]"A man under the age of seventeen years and a woman under the age of fourteen years are incapable of contracting marriage." ALA. CODE, tit. 34, § 4 (1940).

[2]1 BISHOP, MARRIAGE, DIVORCE, AND SEPARATION §§ 105, 110 (4th ed. 1864).

[3]1 *id.* § 109 *et seq.*

[4]1 *id.* § 118; 1 BLACKSTONE'S COMMENTARIES 455.

[5]The expression "common law" is here used broadly to include all powers not derived from statute, whether exercised by courts of law or equity. See 1 BISHOP, MARRIAGE, DIVORCE, AND SEPARATION §§ 56, 57 (4th ed. 1864).

[6]1 BISHOP, MARRIAGE, DIVORCE, AND SEPARATION § 66 *et seq.* (4th ed. 1864).

[7]For a collection of such statutes see 1 VERNIER, AMERICAN FAMILY LAWS § 48 (1931).

[8]Matter of Moncrief's Will, 235 N.Y. 390, 139 N.E. 550, 27 A.L.R. 1117 (1923).

[9]ALA. CODE, tit. 34, § 3 (1940).

[10]Moffitt v. Moffitt, 246 Ala. 174, 19 So.2d 722 (1944); Brand v. State, 242 Ala. 15, 6 So.2d 446 (1941); McCaig v. State, 16 Ala. App. 581, 80 So. 155 (1918), *certiorari denied, Ex parte* McCaig, 203 Ala. 699, 83 So. 927 (1918); Barfield v. Barfield, 139 Ala. 290, 35 So. 884 (1904).

[11]Osoinach v. Watkins, 235 Ala. 564, 180 So. 577, 117 A.L.R. 170 (1938).

[12]Locklayer v. Locklayer, 139 Ala. 354, 35 So. 1008 (1904).

[13]Sibley v. Kennedy, 224 Ala. 354, 140 So. 552 (1932).

*initio*; while marriages involving non-age,[14] duress,[15] fraud,[16] or intoxication at the time of marriage,[17] are voidable. It would seem that the outcome of the principal case would have been the same had the decree been granted because of either duress, fraud, or intoxication.

Mississippi has arrived at the same result as Alabama through a compounding of dictum on dicta. In 1857 a statute[18] was enacted which made insanity at the time of marriage, unknown to the sane spouse, ground for divorce on application by the sane member, and provided that the issue of such marriage should not be bastardized. *Smith v. Smith,*[19] in which divorce under the statute was denied because insanity was not proved, stated as dictum that the statute changed the common law so as to make marriage of the insane voidable rather than void. *Ellis v. Ellis*[20] was a suit by a surviving brother to annul deceased brother's marriage on the ground that deceased's spouse was insane at the time of the ceremony. The case was decided on the ground that there was evidence "that no marriage ceremony was ever, in fact, performed between deceased and appellee." The court, however, stated that under *Smith v. Smith, supra,* the marriage was "valid for all purposes until avoided or annulled, and it cannot be attacked collaterally, but only in a direct proceeding during the lifetime of the parties." In *White v. Williams*[21] annulment was denied, citing the dictum of *Ellis v. Ellis, supra. Parkinson v. Mills*[22] adopted the *Smith* case dictum and granted annulment to the insane spouse on the ground that the divorce statute, being in derogation of the common law, must be strictly construed; and therefore did not change the common law remedy of the insane spouse.[23] Yet, by way of dictum, the court went on to say that the statute made such a marriage voidable rather than void, and therefore a court might grant an annulment decree effective, in the event of issue, only prospectively. *Ervin v. Bass*[24] relies on this dictum in the *Parkinson* case and the dictum in the

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[14]Taylor v. Taylor, 31 So.2d 579 (Ala. 1947); Owen v. Coffee, 201 Ala. 531, 78 So. 885 (1918); Garner v. State, 9 Ala. App. 60, 64 So. 183 (1913); Bennett v. Bennett, 169 Ala. 618, 53 So. 986, L.R.A. 1916C, 693 (1910); Beggs v. State, 55 Ala. 108 (1876).

[15]Bostick v. State, 1 Ala. App. 255, 55 So. 260 (1911); Hawkins v. Hawkins, 142 Ala. 571, 38 So. 640, 110 Am.St.Rep. 53 (1905).

[16]Hyslop v. Hyslop, 241 Ala. 223, 2 So.2d 443 (1941); Farley v. Farley, 94 Ala. 501, 10 So. 646, 33 Am.St.Rep. 141 (1891).

[17]Hamlet v. Hamlet, 242 Ala. 70, 4 So.2d 901 (1941); Henley v. Foster, 220 Ala. 420, 125 So. 662 (1930).

[18]Miss. Code c. XL, tit. IV, art. 15 (1857): "A divorce may be granted in favor of any husband or wife applying for the same if the other party was insane or an idiot at the time of marriage and the party applying did not know of such insanity or idiocy, but such divorce shall not make the children of such parties illegitimate." This identical phraseology last appeared in Miss. Code § 1157 (1880). See note 23 *post.*

[19]47 Miss. 211 (1872).

[20]152 Miss. 836, 119 So. 304 (1929).

[21]154 Miss. 897, 124 So. 64 (1929); *reheard on demurrer to amended petition,* 159 Miss. 732, 132 So. 573, 76 A.L.R. 757 (1930); Comment, 29 Mich. L.J. 1089 (1931).

[22]172 Miss. 784, 159 So. 651 (1935).

[23]But since Miss. Code § 1562 (1890), including the present Miss. Code Ann. (1942) § 2735, the statute has read, "Divorces from the bonds of matrimony may be decreed to the *injured* party for any one or more of the following twelve causes, *viz*; . . . Eighth. Insanity or idiocy at the time of marriage, if the party complaining did not know of such infirmity." [Emphasis supplied] In *Parkinson v. Mills, supra* note 22, the insane party was the injured party. Compare with the statute of 1857, note 18 *supra,* which the *Smith* case construed.

[24]172 Miss. 332, 160 So. 568 (1935); and on amended bill, Bass v. Ervin, 177 Miss. 46, 170 So. 673 (1936); Comment, 10 Miss. L.J. 85 (1937).

*Ellis* cases concerning a divorce statute, as authority to annul a marriage on the ground of duress, effective, insofar as the rights of issue were concerned, only from the date of the decree.

The decree issued in the principal case is a logical extension of decisions of courts which recognize certain rights created by or during the existence of voidable marriages. Voidable marriages have been sufficient after annulment: to satisfy a statute removing the disabilities of minority from women over the age of seventeen upon marriage;[25] or to bring into operation a provision in a will for division of devised property among tenants in common when they all "marry, or die;"[26] or to suspend alimony granted upon divorce of the first marriage during the existence of a second voidable one;[27] or to enable a woman to retain jewels given her in consideration of marriage, bought by the husband before marriage with funds he embezzled from the claimant's assignor;[28] or to serve as a defense under a statute providing for the dismissal of seduction charges "if the parties marry each other at any time before the defendant pleads to the indictment."[29] "The doctrine of relation [back] is a fiction of law adopted by the courts solely for the purposes of justice,"[30] and it is submitted that the Alabama court served the end of justice by refusing to apply this fiction in the principal case.

*Nathan Levy, Jr.*

## Mines and Minerals—Exception of Mineral Interest

Grantor conveyed to grantee certain land with the following reservation: "In the event of any minerals, oil or gas being found in the bounds of the land we are to share the profits equally." The grantor's declaration stated that the clause given above excepted one-half the minerals in place. The lessee of the grantee demurred to this, saying the grant excepted only a non-participating royalty. The demurrer was overruled. Held: Reversed and remanded. The deed reserved to grantor one-half of the one-eighth royalty. *Gulf Refining Co. v. Stanford,* 30 So.2d 516 (Miss. 1947).

In interpreting a deed there are two points to be examined: (1) The legal meaning of the words, (2) Intention of the parties.

Since Mississippi follows the rule that oil and gas is an estate in land that can be owned separately,[1] the law of real property forms a natural foundation for oil and gas law. Therefore it will be useful to survey briefly court interpretations of the word "profit."

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[25]Bennett v. Bennett, note 14 *supra.*

[26]Miller v. Wall, 216 Ala. 448, 113 So. 501 (1926).

[27]Strode v. Strode, 3 Bush 227, 96 Am.Dec. 211 (Ky. 1867); Sleicher v. Sleicher, 251 N.Y. 366, 167 N.E. 501 (1929), Notes, 43 Harv. L. Rev. 109, 29 Col. L. Rev. 1010, 25 Ill. L. Rev. 99, 14 Minn. L. Rev. 93, 15 Iowa L. Rev. 107.

[28]American Surety Co. of N. Y. v. Conner, 251 N.Y. 1, 166 N.E. 783, 65 A.L.R. 244 (1929); Notes, 29 Col. L. Rev. 528, 43 Harv. L. Rev. 109, 28 Mich. L. Rev. 206. In this case Cardozo, C.J., set forth the well-known statement, "The decree of annulment destroyed the marriage from the beginning as a source of rights and duties . . . but it could not obliterate the past and make events unreal . . ."

[29]Burney v. State, 111 Tex. Cr. R. 599, 13 S.W.2d 375 (1929).

[30]Sleicher v. Sleicher, note 27 *supra.*

[1]Koenig v. Calcote, 199 Miss. 435, 25 So.2d 763 (1946); Lloyd's Estate v Mullen Tractor and Equipment Co., 192 Miss. 62, 4 So.2d 212 (1941); Stern v. Great Southern Land Co., 148 Miss. 649, 114 So. 739 (1927).

In *Weekland v. Cunningham*[2] the phrase, "excepting the profits of one-half of all the stone, coal, and all other kinds of mineral which may be discovered at any time hereafter," was held to convey one-half of the minerals in place. The facts in this case are almost identical with facts of the present case: (1) The exception in each case is of a one-half interest; (2) It applies to all "minerals in place" including oil and gas; (3) It excepts the "profits"; (4) The clause "which may be discovered at any time hereafter," is very similar to that clause used in the deed in case at bar. In other cases it has been held that the word "profits" transfers the land itself.[3]

Exceptions in terms of royalties, royalty rights and interest are not to be confused with the exception in the case at bar. Royalty is a payment reserved by the grantor for the lease of a mineral or mine. The lessor-lessee relationship is essential to the existence of a royalty.[4] The leasehold estate has nothing to do with profit as was pointed out in the *Schermerhorne* case,[5] inasmuch as the term "profits" has historically included the whole interest. The difference between royalties and profits was emphasized by the court in *Miller v. Sooy*.[6] The conveyance was of an undivided one-half interest in the royalties, rents, bonuses, and other considerations to accrue by virtue of any oil and gas lease. The court held that "the title to the oil and gas did not pass to the plaintiff, for the defendants might have elected to develop the land themselves on their own account, in which event the plaintiff would have had no claim to the oil and gas produced." Because of dissimilarity between the terms profits and royalties, the contention that a grant of profits of land is a grant of the land itself was dismissed as being inapplicable under the facts of this case. The result is the same if the grant makes no express reference to a lease.[7]

In interpreting an instrument in modern times the cardinal rule of construction is the intent of the parties.[8] Therefore, the primary consideration in the instant case on appeal should be whether the facts well pleaded clearly and manifestly show that the intention was a reservation only of a non-participating one-sixteenth royalty interest, in order that it may be said that the lower court was wrong in overruling the demurrer. It seems that evidence should be introduced to determine the intent of the parties, inasmuch as the words are at least ambiguous. These are the only facts contained in the record on appeal: (1) The grantor assigned one-half of his interest which he had excepted from the conveyance to another. This fact shows neither intent to except oil in place nor intent to except non-participating royalties. (2) The grantee executed a deed of trust in which he placed the phrase "subject to a reservation of an interest in the mineral rights to said land reserved in deed recorded in Book 2, page 122." This merely estab-

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[2]3 Sad. 516, 7 Atl. 1043 (Pa. 1866). Also McWilliams v. McNarmara, 81 Conn. 310, 70 Atl. 1043 (1908); Earl v. Rowe, 35 Me. 414, 58 Am.Dec. 714 (1853).

[3]Baker v. Scott, 62 Ill. 86 (1871) (devise reading: "may come into possession of full amount of rents and profits"); Ball v. Handock's Administrator, 82 Ky. 107 (1884) (devise saying: "and to take the profits thereof"); Schermerhorne v. Schermoerhorne, 6 Johns.Chan. 70 (N.Y. 1822) (devise of "profits").

[4]Holland v. Shaller, 162 Kan. 474, 178 P.2d 235 (1947).

[5]6 Johns.Chan. 70 (N.Y. 1822).

[6]120 Kan. 310, 242 Pac. 140 (1926).

[7]Smith v. Schlittler, 128 Tex. 628, 101 S.W.2d 543 (1947).

[8]Allen v. Boykin, 199 Miss. 417, 24 So.2d 748 (1946); Gulf and S.I.R. v. Patten, 180 Miss. 756, 178 So. 468 (1938); Dunn v. Stratton, 160 Miss. 1, 133 So. 140 (1931).

lishes the intent to make some exception but does not tell us what kind. (3) The absence of words in the deed enumerating the powers of the grantor to deal with his interest. Certainly if the deed excepts a non-participating royalty there would not need to be any further enumeration of powers possessed by grantor because he has none. While it is true that in an exception of oil in place the grantor has numerous powers, any expression of them is frequently omitted without affecting the validity of the exception of oil in place.[9]

The grantor in the deed seems to interpret the deed as an exception of one-half the oil in place because he made a co-lessor's agreement with the lessee oil company and received rentals for years thereon. This fact seems very significant in the determination of the intent of the parties, since another rule of interpretation is that in cases of ambiguity the court will apply the interpretation which the parties by their act place upon the instrument.[10]

Therefore, because (1) the findings of the lower court are not as a matter of law clearly contra to the meaning of the word profits and (2) because the lessee had knowledge of the interpretation placed on the instrument by the grantor, it seems the court should have affirmed the decision of the lower court, in order that the final decision in the case could be determined after full evidence is introduced as to intent of the parties.

*Homer Lee Howie*

## Negligence—Automobile Accidents—Assumption of Risk as a Defense—Contributory Negligence Distinguished

Deceased, riding in owner's truck as a guest of driver, was killed when the truck ran off the highway and overturned. Plaintiff, widow of deceased, brought an action against both owner and driver, charging driver with grossly negligent and careless behavior in driving while intoxicated, and charging owner with negligence in hiring driver, who had a reputation for habitual drunkeness. Held: Recovery was barred because deceased was not merely contributorily negligent in riding with intoxicated driver, but rather, assumed all risks of the trip, even if deceased himself was in a voluntary state of intoxication. *Saxton v. Rose,* 29 So.2d 646 (Miss. 1947).

An early application of the phrase "assumption of risk" as a defense in actions for personal injuries, was to cases arising out of the master-servant relationship,[1] or cases involving a contract relationship,[2] but it is now established in most jurisdictions that the defense may exist independently of any contract between the parties.[3]

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[9]Stern v. Great Southern Land Co., *supra* note 1; Moss v. Jourdan, 129 Miss. 598, 92 So. 689 (1922).

[10]Sumter Lumber Co. v. Skipper, 183 Miss. 595, 184 So. 296 (1938); Kelly v. Harris, 62 Okla. 236, 162 Pac. 219 (1916).

[1]Johnson v. Mammoth Vein Coal Co., 88 Ark. 243, 114 S.W. 722 (1908), citing Schlemmer v. Buffalo R. & P. Ry. Co., 205 U.S. 1 (1906); Choctaw O. & G.R. Co. v. Jones, 77 Ark. 367, 92 S.W. 244 (1906).

[2]*See* 38 Am. Jur., *Negligence,* § 171 and cases there cited, note 19.

[3]*Id.,* note 20.

The doctrine of assumption of risk appears to have flourished in three fields: (1) cases arising out of employment relations[4] (abrogated in many states by statute);[5] (2) cases involving the liability of a possessor of land to persons coming on that land;[6] and (3) the automobile accident field, particularly in cases involving a gratuitous host-guest relationship.[7] The subject case, then, comes under the last-mentioned category.

There has been a great deal of confusion demonstrated, particularly in the earlier automobile accident cases, as to the distinction, if any, between the defense of contributory negligence and the defense called assumption of risk. Assumption of risk is said to be closely associated with contributory negligence; however, there is a clear distinction between the two defenses,[8] notwithstanding the fact that both may arise under the same set of facts.[9] The distinction is clear when it is understood that an injured party may assume the risk of his injury regardless of the exercise of due care for his own safety; while to be contributorily negligent the injured party must be guilty of acts of carelessness or inadvertence which go to the proximate cause of his injury.[10] The elements which must be found in order to constitute a defense of assumption of risk are generally stated in some such terms as the following:[11] (1) knowledge on the part of the injured party of a condition inconsistent with his safety; (2) appreciation by the injured party of the danger in the condition; and (3) a deliberate and voluntary choice on the part of the injured party to expose his person to that danger in such a manner as to register assent to the continuance of the dangerous condition. It would seem then, that while contributory negligence is a matter of conduct, assumption of risk arises from a mental state of willingness,[12] or a mental state approaching consent.[13]

While it is now generally recognized that the defense of assumption of risk may exist independently of any contractual relationship[14] and is a defense to be distinguished from contributory negligence,[15] it is to be noted that courts often

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[4]So. Pac. Co. v. McCready, 47 F.2d 643 (C.C.A.9th 1927); Schuppenies v. Oregon Short Line R. Co., 38 Idaho 622, 225 Pac. 501 (1924); Biskup v. Hoffman, 287 S.W. 869 (Mo. 1926); Bodie v. Charleston & W.C., 61 S.C. 468, 39 S.E. 715 (1901).

[5]MISS. CODE ANN. (1942) § 1456.

[6]Schmidt v. Bauer, 80 Cal. 565, 22 Pac. 256 (1889); Pomponio v. New York, H. H. & H. R. Co., 66 Conn. 528, 34 Atl. 491 (1895); Gibson v. Leonard, 143 Ill. 182, 32 N.E. 182 (1892).

[7]Sloan v. Gulf Refining Co. of Louisiana, 139 So. 26 (La. App. 1924); Schubring v. Weggen, 234 Wis. 517, 291 N.W. 788 (1940); Scory v. Lafave, 215 Wis. 21, 254 N.W. 643 (1934); Knipfer v. Shaw, 210 Wis. 617, 246 N.W. 328 (1933).

[8]St. Louis Cordage Co. v. Miller, 126 Fed. 495 (1930); Westcott v. Chicago Great Western R. Co., 157 Minn. 325, 196 N.W. 272 (1923); PROSSER, TORTS 378 (1941).

[9]Nodland v. Kreutzner & Wasem, 184 Iowa 476, 168 N.W. 889 (1918); Westcott v. Chicago Great Western R. Co., *supra* note 8.

[10]Edwards v. Kirk, 227 Iowa 684, 288 N.W. 875 (1939); Warner v. Markoe, 171 Md. 351, 189 Atl. 260 (1937); Westcott v. Chicago Great Western R. Co., *supra* note 8.

[11]Indianapolis & St. L. R. Co. v. Watson, 114 Ind. 20, 14 N.E. 721 (1887); Knipfer v. Shaw, 210 Wis. 617, 246 N.W. 328 (1933); RESTATEMENT, TORTS § 893 (1939); PROSSER, TORTS 377 (1941).

[12]*See* note 11 *supra.*

[13]PROSSER, TORTS 376 (1941); *Cf.* RESTATEMENT, TORTS § 893, *comment a* (1939).

[14]*See* note 2 *supra.*

[15]*See* notes 8 and 9 *supra.*

use the term "assumption of risk" to describe different principles. At least one court has been said authoritatively to use the term to describe three distinct doctrines.[16] Many courts have said that the doctrine is based on the maxim, *volenti non fit injuria* (one who, knowing and appreciating a danger, voluntarily assumes the risk of it).[17] Other courts have used the term "assumption of risk" not to infer that the injured person chose voluntarily to incur a known danger, but to state the position of the injured party where the party creating the dangerous condition was either under no duty to him or if under a duty, not violating it.[18] It would thus appear essential to examine decisions in which the doctrine of assumption of risk is applied, with an eye to determining exactly what principle the court is applying in each.

The necessity for taking a definite stand on the doctrine of assumption of risk as distinguished from contributory negligence and the importance of the subject case as a step in that direction, is pointed up by the existence in Mississippi of the comparative negligence statute,[19] under which contributory negligence merely diminishes damages and does not bar recovery completely.

An examination of the Mississippi decisions will reveal that the Mississippi Supreme Court has not been altogether consistent in its treatment and application of the doctrine of assumption of risk, and will serve further to emphasize the importance of the subject decision. In 1928[20] under a fact situation analogous to that in the subject case, the court barred recovery of a guest against an intoxicated host by application of what appears to be an imputed negligence principle. In 1933[21] and again in 1938[22] the court apparently recognized that some sort of an assumption of risk doctrine exists independently, in host-guest cases, of any question of contributory negligence, but as late as 1934,[23] the Mississippi court with "limited exceptions" still regarded the doctrine of assumption of risk as pertaining only to contractual relations and implied that assumption of risk belonged in the general classification of contributory negligence.

In the subject case the court, while recognizing the doctrine of assumption of risk as a defense independent of any contractual relation and independent of any question of contributory negligence, appears still to place the doctrine within some conception of imputed negligence.[24] It would appear further that the court in holding that voluntary drunkenness of deceased would not excuse him from the rule, may well be grounding the doctrine of assumption of risk in automobile accident cases in a limitation on the duty of the host to the guest,[25] because if deceased were so intoxicated that he was unable to comprehend what he saw and heard, it would seem difficult to find the necessary elements of assumption of risk in his state of mind.

*Paul N. Nunnery*

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[16]Campbell, *Host-Guest Rules in Wisconsin*, 1943 WIS. L. REV. 180.

[17]Rose v. Minneapolis, St. P. & S.S. M.R. Co., 107 Minn. 260, 120 N.W. 360, 363 (1909); Osterholm v. Boston & Montana Consol. Copper & Silver Min. Co., 40 Mont. 508, 107 Pac. 499 (1910).

[18]45 C.J. 1044, and cases there cited, note 76; *Accord:* Campbell, *Host-Guest Rules in Wisconsin*, 1943 WIS. L. REV. 180.

[19]MISS. CODE ANN. (1942) § 1454.

[20]Chapman v. Powers, 150 Miss. 687, 116 So. 609 (1928).

[21]Gower v. Strain, 169 Miss. 344, 145 So. 244 (1933).

[22]Monsour v. Farris, 181 Miss. 803, 181 So. 326 (1938).

[23]Watson v. Holeman, 169 Miss. 585, 153 So. 669 (1934).

[24]Saxton et al. v. Rose et al, 29 So.2d 646, 650 (Miss. 1947).

[25]*See* note 18 *supra.*

## RECENT BOOKS

This department undertakes to note or review briefly current books on law and matters closely related thereto. Periodicals, court reports, and other publications that appear at frequent intervals are not included. The information given in the notes is derived from inspection of the books, publisher's literature, and the ordinary library sources. The information given in the reviews is derived from a personal reading of the book by the individual whose name appears at the bottom of the review.

## BRIEF REVIEWS

BRANDEIS: A FREE MAN'S LIFE, by Alpheus Thomas Mason; The Viking Press, New York; 1946, pp. 713. $5.00.

As a professor of political science in Princeton University, Alpheus Thomas Mason has devoted more than a score of years to an intense study of the personal attributes and professional activities of the marvelous jurist, Louis Dembitz Brandeis. He has written two previous publications about this great man. One who casually reads this last great publication may have the reaction that the author has given far more emphasis to the sixty years when Brandeis was preparing for his life-work and in the practice of his profession than to the thirty-three years when he was an Associate Justice of the United States Supreme Court. Five chapters are devoted to Brandeis' heritage; ten to his New England battles for social justice and sound economics in corporate management; seven to his professional activities on the national stage; and seven more to his role in national politics. Then follow the two chapters setting forth in detail the fight in the Senate to defeat the confirmation of Brandeis as a Wilson appointee to the United States Supreme Court. About one-half of the remaining ten chapters presents his eminent services as a liberal judge of the United States Supreme Court.

The apparent lack of proportion in treating Brandeis as the first thoroughgoing progressive ever to serve upon the United States Supreme Court is justifiable on the ground that his service as a justice for nearly a quarter of a century was a continuation of his practice at the bar for a third of a century—in a local sense in Boston and in a national sphere in Washington, D. C.

In presenting Brandeis as a court justice, his character and genial personality are delineated with the precision of the candid camera. The author shows clearly that Brandeis, because of his zeal for the common good and his professional course as a free man, had incurred the enmity of powerful and vested interests. The long and bitter fight over his nomination in 1916 is vividly shown. And it is made equally clear that his Christian character prevented him, when once admitted to the bench of the United States Supreme Court, from having any but the most kindly and tolerant personal feelings toward his conservative associates, despite the sharp differences on constitutional questions. One is continually astonished at the self-mastery and poise of this man in the face of the greatest of difficulties. As Professor Mason observes, Brandeis proved "his infinite genius for adapting himself to, and working with, all sorts and conditions of men."

The author has well said that Brandeis was not a conventional lawyer and that it was not likely that he would be a conventional judge. As a new Supreme

Court justice, Brandeis adhered to the time-honored judicial presumption that an act of the legislature was constitutional unless explicitly expressed or necessarily implied otherwise. He firmly insisted that court judges were without constitutional warrant or authority to invalidate social legislation unless it was plainly repugnant to the fundamental law. As it was expected, he had occasion to dissent frequently from the majority opinions of a conservative court. But in his numerous dissents from the reasoning of the conservative judges, he was uniformly courteous and considerate. His comments in dissenting opinions were direct and dignified, never caustic and disparaging. Designedly, it seems, his use of the dissenting opinion was an educational device for explaining and illuminating the background to the law. His was a consistent course. Brandeis was ever striving to bring American jurisprudence abreast the social changes wrought through invention and through new modes of living. As he once remarked in a letter to his wife: "even my revered associates on the Bench . . . must begin to realize that we are not living in the nineteenth century." His was certainly a rare mind. Through the magic of clear reasoning he could convince the Interstate Commerce Commission that the railroads did not need rate increases, when they could effect marked savings in operating costs.

Professor Mason brings out with sunlight clearness Brandeis' challenge to corporate aggregates. Quite adroitly did Brandeis direct attention to the inconsistency between allowing, on the one hand, huge combinations like the United States Steel Corporation and denying, on the other hand, the right of working men to organize cooperatively. He insisted that workingmen should enjoy industrial liberty as well as proper housing, clothing, and food, and the advantanges of education and recreation. Social justice, he stressed, included industrial democracy as well as political democracy. He wished to avoid the inevitable conflict between our political liberalism and our industrial absolutism. Above all, Brandeis was a humanist-jurist.

As a friend of labor, Brandeis believed that labor had the same right to organize and to be heard in its own behalf that capital had. However, since he disapproved of arbitrariness in capital, he likewise opposed the strike and the closed-shop as species of tyranny. He could see no reason for substituting the tyranny of labor for the tyranny of capital. Each form of tyranny he regarded as antisocial and indefensible. From various angles, Professor Mason shows that Brandeis regarded the existence of social and economic ills to be the result of the maladjustments of capital and labor, of industry and agriculture, of creditors and debtors. Discovery and invention called for social adaptations that were overlooked by most group and class leaders. Brandeis believed that social invention should follow in the wake of mechanical invention.

It was not until shortly before his retirement that Brandeis was able to see the complete change of the United States Supreme Court from conservative to liberal. But during Roosevelt's second term, and before his retirement from the court in 1939, Brandeis saw Van Deventer, Sutherland, and Butler replaced by three liberals—Black, Reed, and Frankfurter. Then shortly after the retirement of Brandeis, he lived to see three other liberals—Murphy, Jackson, and Douglas—made members of the court. From 1916 to 1941, tardy at first, but accelerated at last, Brandeis hailed the miracle of a complete liberalization of the United States Supreme Court. Well does Professor Mason observe: "The prophet has indeed come into honor in his own country and in his own time."

Many biographies are constantly appearing, but it is only now and then that a great work of this sort is published. However, it cannot be gainsaid that Mason's *Brandeis: A Freeman's Life* comes within the category of a truly great literary and informative achievement. Great writer and scholar that he is, Professor Mason had for his subject the life and public service of a juristic statesman of the first magnitude.

*Claude V. Hall*

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MUNICIPAL REGULATION OF PEDDLERS, SOLICITORS & ITINERANT MERCHANTS, by Charles S. Rhyne, Charles H. Burton, and Charlie O. Murphy; Washington, D. C.; National Institute of Municipal Law Officers, 1947. (Report # 118) pp. 165 $5.00.

PARKING METERS—LEGALITY—MODEL ORDINANCE ANNOTATED, by Charles S. Rhyne and Charlie O. Murphy; Washington, D. C.; National Institute of Municipal Law Oficers, 1947. (Report # 119) pp. 29 $2.00.

CITY SMOKE CONTROL AND AIR POLLUTION PROGRAMS—MODEL ORDINANCE ANNOTATED by Charles S. Rhyne and William G. Van Meter; Washington, D. C.; National Institute of Municipal Law Officers, 1947. (Report # 120) pp. 23 $2.00.

MUNICIPALITY OWNED PARKING LOTS AND GARAGES, by Charles S. Rhyne; Washington, D. C.; National Institute of Municipal Law Officers, 1948 (Report # 121) pp. 54 $3.00.

These four reports by the staff of the National Institute of Municipal Law Officers are devoted to problems of current interest. The first, of course, is a perennial source of trouble, involving the reconciliation not only of difficult problems in the field of free speech and religion, but also in the economic conflict between the "established" (and often higher-priced) merchant and the "out-of-town" competition. The second deals with the purpose and legality of a system being used by more and more cities as a means of regulating automobile parking in the congested business areas. The third is designed mainly as an aid to cities which suffer waves of dense, impure smoke and polluted air—its purpose is to discuss a legal means of abating this nuisance. The fourth considers its subject from the viewpoint of the city attorney and deals with the various legal aspects surrounding public ownership and operation of public parking facilities.

Each report gives a thorough resumé of all court decisions in the field, some discussion of the practical problems involved, and closes with a draft of a model ordinance, annotated to the case-law survey in such a manner as to indicate the legal problems raised and met by each provision.

*Frank E. Shanahan, Jr.*

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FOR THE DEFENSE, by Lloyd Paul Stryker; Doubleday & Company, Inc., Garden City, New York; 1947 pp. 624. $5.00.

The seventy three years of Thomas Erskine's life, 1750 to 1823, extended through one of the most momentous and tumultous periods in history. The American and French Revolutions, the rise and fall of Napoleon, early stirrings of the Industrial Revolution poised problems and engendered repercussions in England grave and troublesome.

Thomas Erskine was born in Edinburgh, Scotland. As a youth he served in the Navy and then the Army. Drawn one day to a court room as a curious spectator he became interested. He caught the fancy of Lord Mansfield, one of England's greatest jurists, who encouraged him to study law. Resigning his commission Erskine began the study of law in Lincoln's Inn, with a wife and family patiently but anxiously, dependent on him. In 1778 when he was 28 Erskine was called to the bar.

In the very first year of his practice, verily his frst retainer as a barrister, he was chosen to assist in the defense of an old Sea Captain, Thomas Baille, who dared speak out critically of shocking frauds in the Veterans Administration. Baille was haled into court by the powerful, corrupt and infamous Earl of Sandwich. Breasting heavy political pressure young Erskine vigorously denounced Sandwich and won acquittal for his first client. England thus had found a fresh, vibrant voice, a courageous advocate whose ringing eloquence with telling effect thrilled the nation, particularly the oppressed common man everywhere.

We live with Erskine through triumphs and struggles on behalf of the rights of men. The courtroom was his forum. "Trial by Jury" became a sanctuary that withstood the repeated onslaughts of tyranny. We see him arouse a tired bored jury, firmly stand his ground before a hostile judge, combat the political forces against his cause. We observe his matchless skill in beating down or avoiding such barriers. Lawyers will relish this study of a master courtroom strategist narrated through the discerning mind of a distinguished American advocate. The author carefully prepares the facts of each case. The complete background of turbulent times is carefully analyzed and stated.

Erskine won his greatest fame as a defender of charges for "seditious libel" and "constructive treason." As a member of Parliament Erskine achieved little success, and as a prosecutor he had no heart for the task. Elevated to the exalted position of Lord Chancellor he enjoyed only a brief tenure. His proper role was the advocate, for here his powers were most effectively directed. After his appointment as Chancellor he was thenceforth removed from active practice; therefore his latter years were comparatively inactive.

We glimpse many towering characters of the period. Dr. Samuel Johnson, Edmund Burke, Charles Fox, William Pitt the younger, Thomas Paine and many others.

Book five, treating his retirement from the bench and the subsequent years of Erskine's life, is anticlimatic. While it presents a well told story of the period and focuses attention on several interesting events, it is a digression. We lose sight of Erskine and become involved in a collateral story in which the retired advocate plays such a minor part that the little light shed on him scarcely justi-

fies the tedious relation of the details of the vicissitudes of poor Queen Caroline who is accused of treason because of adultery.

There is much to be gained from a careful analysis of Erskine's jury technique. The story is well and capably told.

*Frank E. Everett, Jr.*

Attorney-at-Law
Vicksburg, Miss.

## BOOK NOTES

*Aviation*

AVIATION ACCIDENT LAW, by Charles S. Rhyne; Columbia Law Book Co., Washington 6, D. C.; 1947. pp. 315. A complete collection and analysis of all reported court decisions involving aviation accidents together with a reference to legislation and international conventions which have application in this field.

*Constitutional Law*

WE THE PEOPLE, by Nathan Boone Williams; The Heffernan Press, Worcester, Mass.; 1944. pp. 161 $1.50. A review of the purposes of a free people as set forth in the Preamble to the Constitution of the United States.

*Courts*

PEOPLE'S COURT, by Edward C. Fisher; The Northwestern University Traffic Institute, Evanston, Ill.; 1947. pp. 164. A book about the traffic court by one who has been the judge in a traffic court for many years. Its emphasis is upon the court as an agency of all the people.

*Legal Education*

A CENTURY OF LEGAL EDUCATION, edited by Robert H. Dettach; The University of North Carolina Press, Durham, N. C.; 1947. pp. 146. One of the University of North Carolina Sesquicentennial Publications. This is a history of the Law School of the University of North Carolina.

ANNUAL SURVEY OF AMERICAN LAW, edited by the faculty of the New York University School of Law, Washington Square East, New York; 1946. pp. 1735. An annual (1945) survey of American Law. The survey is broken into five major parts and under each part is presented the appropriate field of law. The survey covers (1) Public Law: In General; (2) Public Law: Social, Business and Labor Regulation; (3) Private Law; (4) Adjective Law; and (5) Legal Philosophy, History and Reform.

*Legislative*

CASES AND MATERIALS ON LEGISLATION, Horace E. Read and John W. MacDonald; The Foundation Press, Inc., Brooklyn, New York; 1948. pp. 1357. $8.50. This work is designed as the basis of a law school course in the methods of the legislative process and in the judicial techniques of applying statutes in the solution of legal issues.

*Patents*

THERE IS NO MYSTERY ABOUT PATENTS, by William R. Ballard; J. M. Barett Corp., New York 17, N. Y.; 1946. pp. 120. $2.00. The purpose of this brief work is to present in a condensed form and in simple terms the philosophy and fundamentals of the American patent system, and to indicate how that system works to accomplish its intended purpose, and why.

## ACKNOWLEDGMENT OF BOOKS RECEIVED

LAWS OF THE MISSISSIPPI TERRITORY, SEPTEMBER 21-OCTOBER 5, 1799, edited by William D. McCain; Beauvoir Community, Mississippi; The Book Farm, 1948. No. 74, Heartman's Historical Series.

LAWS OF THE MISSISSIPPI TERRITORY, MAY 27, 1800, edited by William D. McCain; Beauvoir Community, Mississippi: The Book Farm, 1948. No. 75, Heartmen's Historical Series.

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